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ABSTRACT

The Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated in the Spring of 1975 by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice. The efforts of this task force resulted in nine reports, each one dealing with one aspect of the Juvenile Justice System. This particular volume presents an overview of the critical issues regarding juvenile dispositions and corrections, and presents a series of four comparative analyses which explore the following: (1) who should be the authority to impose and modify dispositions; (2) what time limits should be applied to dispositional orders and the court's continuing jurisdictional authority; (3) what procedures should be employed in the dispositional hearing; and (4) what are the rights of the juvenile to receive services. (Author/CKJ)

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A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES

# JUVENILE DISPOSITIONS AND CORRECTIONS

## VOLUME IX OF IX

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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National Institute for Juvenile Justice and Delinquency Prevention

Office of Juvenile Justice and Delinquency Prevention

Law Enforcement Assistance Administration

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A COMPARATIVE ANALYSIS OF
STANDARDS AND STATE PRACTICES

# JUVENILE DISPOSITIONS AND CORRECTIONS

VOLUME IX OF IX

Working Papers of the National Task Force
to Develop Standards and Goals for Juvenile
Justice and Delinquency Prevention

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National Institute for Juvenile Justice and
Delinquency Prevention

Office of Juvenile Justice and
Delinquency Prevention

Law Enforcement Assistance Administration

U.S. Department of Justice

## PREFACE TO WORKING PAPERS

### Task Force Origin and Mission

The National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated as part of Phase II of the standards and goals effort undertaken by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice.

The original portion of this effort (Phase I) led to the establishment of the National Advisory Commission on Criminal Justice Standards and Goals in October of 1971. To support the work of the National Advisory Commission, special purpose Task Forces were created, each concentrating on a separate area of concern in criminal justice. The efforts of the Task Forces resulted in the completion of five reports: Courts; Police; Corrections; Criminal Justice System; and Community Crime Prevention. In addition, the National Advisory Commission itself produced an overview volume entitled A National Strategy to Reduce Crime. Following the completion of these works in 1973, the National Advisory Commission was disbanded.

In the Spring of 1975, LEAA established five more Task Forces coordinated by a newly created National Advisory Committee to carry out the work of Phase II. The five Task Forces were Private Security; Organized Crime; Civil Disorders and Terrorism; Research and Development; and, of course, the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention.

From the beginning there was a recognition that the work of the Juvenile Justice and Delinquency Prevention Task Force was much broader than the other four groups. The charge of the Juvenile Justice Task Force was to supplement virtually all of the work of the Phase I National Advisory Commission with a "juvenile" version of the original adult-oriented standards and goals statements.

In all, the Task Force met ten times, for two or three days each time, in public meetings in various parts of the nation. At these meetings the Task Force was able to solidify its group philosophy, analyze the issues of importance in juvenile justice and delinquency prevention, direct the writing of standards and commentaries, review and modify draft material, and react to National Advisory Committee recommendations. The final results of the Task Force's efforts are set forth in the forthcoming volume on Juvenile Justice and Delinquency Prevention, soon to be published by LEAA.

Throughout its work process, the Task Force had the benefit of staff assistance. The American Justice Institute (AJI) of Sacramento, California, received a grant from LEAA to support the work of the Task Force.

## Task Force Working Procedures and Use of Comparative Analyses

The time and resources provided to accomplish the challenging task of producing the standards volume did not allow the Task Force to conduct new research in juvenile justice and delinquency prevention. However, the Task Force did utilize a methodology which assured the incorporation of the best scholarship and state-of-the-art knowledge currently available.

This methodology involved identifying the major issues or questions which needed to be resolved before the Task Force could promulgate standards. Comparative Analyses were then constructed around each of these issues. Each Comparative Analysis begins with a comparison of the positions taken on the issue by other standard-setting organizations--previous Task Forces, Commissions, etc. The Comparative Analyses also consider the current practice of each state with regard to the issue in question.

These background materials were designed not only to make Task Force members aware of the various positions that had been taken with regard to a particular issue, but also to provide the Task Force with a complete analysis of the arguments for and against the full range of options presented.

Using the Comparative Analyses as a basis for its discussion and deliberation, the Task Force then directed the staff and consultants to prepare standards and commentaries in line with the positions which it took in each of these areas. This process proved to be very productive for the Task Force members. It allowed informed consideration of the pertinent issues prior to the adoption of any particular standard.

## Compilation of Working Papers

Following completion of the Task Force's work, it was clear to members of the AJI staff and officials at LEAA that the Comparative Analyses prepared to assist the Task Force in its preparation of the standards volume could be useful to other groups. In particular, it was recognized that states and localities which plan to formulate standards or guidelines for juvenile justice and delinquency prevention will need to traverse much of the same territory and address many of these same questions. As a result, LEAA's National Institute for Juvenile Justice and Delinquency Prevention provided the AJI staff with a grant to compile the materials in their present form.

The Comparative Analyses have been organized in a series of nine volumes of Working Papers, each devoted to a particular aspect of juvenile justice and delinquency prevention. (A complete table of contents of each of the volumes is set forth in the appendix.) Some subjects have been analyzed in considerable detail; others, because of limited time or consultant resources, have been given abbreviated treatment. Thus, while it is recognized that these Working Papers do not present a comprehensive examination of all of the important issues in juvenile justice--or even of all of the issues considered by the Task Force--they do represent a useful survey of a wide range of subjects, with a wealth of data on many of the particulars. Using these materials as groundwork, other groups with interests in individual facets of the juvenile system may wish to expand the research as they see fit.

Although the Comparative Analyses should not be taken to represent the Task Force's views--they were prepared by project consultants or research staff and were not formally approved by the Task Force or reviewed by the National Advisory Committee--it was decided that it would be helpful to outline the position taken by the Task Force on each of the issues. Therefore, the AJI staff reviewed each of the Comparative Analyses and added a concluding section on "Task Force Standards and Rationale" which did not appear in the materials when they were considered by the Task Force.

A more thorough exposition of the Task Force's views can be found in the forthcoming volume on Juvenile Justice and Delinquency Prevention, which should, of course, be consulted by those considering these Working Papers.

The efforts of the many consultants and research assistants who prepared the drafts of these materials is gratefully acknowledged. Any errors or omissions are the responsibility of the American Justice Institute, which reviewed the materials and assembled them in their present form.

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# FOREWORD

Over the past ten years, a number of national efforts have developed regarding juvenile justice and delinquency prevention standards and model legislation. After the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415) and in conjunction with LEAA's Standards and Goals Program, many States started formulating their own standards or revising their juvenile codes.

The review of existing recommendations and practices is an important element of standards and legislative development. The National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP) has supported the compilation of the comparative analyses prepared as working papers for the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention in order to facilitate this review. Over one hundred issues, questions, and theories pertaining to the organization, operation, and underlying assumptions of juvenile justice and delinquency prevention are covered in the analyses. These are divided into nine volumes: Preventing Delinquency; Police-Juvenile Operations; Court Structure; Judicial and Non-Judicial Personnel and Juvenile Records; Jurisdiction-Delinquency; Jurisdiction-Status Offenses; Abuse and Neglect; Pre-Adjudication and Adjudication Processes; Prosecution and Defense; and Juvenile Dispositions and Corrections.

The materials discussed in these reports reflect a variety of views on and approaches to major questions in the juvenile justice field. It should be clearly recognized in reviewing these volumes that the conclusions contained in the comparative analyses are those of the Task Force and/or its consultants and staff. The conclusions are not necessarily those of the Department of Justice, LEAA, or NIJJDP. Neither are the conclusions necessarily consistent with the recommendations of the Advisory Committee on Standrds that was established by the Act, although the Committee carefully considered the comparative analyses and endorsed many of the positions adopted by the Task Force.

Juvenile justice policies and practices have experienced significant changes since the creation of the first juvenile court in 1899. The perspective provided by these working papers can contribute significantly to current efforts to strengthen and improve juvenile justice throughout the United States.

James C. Howell
Director
National Institute for Juvenile Justice
and Delinquency Prevention
January, 1977

# INTRODUCTION

## Volume IX: Juvenile Dispositions and Corrections

This volume contains a variety of materials which focus on various aspects of juvenile dispositions and corrections. The volume begins with a memorandum which provides an overview and statement of critical issues in this area. The memorandum covers a wide range of subjects in a cursory fashion, from the broad-scoped issue of the proper purposes of juvenile dispositions to a number of narrower issues relating to specific procedural questions. This paper was originally drafted to give the Task Force a thumbnail sketch of the major issues in this area; hopefully it can provide the same sort of guidance to other groups.

A series of four Comparative Analyses then explore individual issues in greater depth. First of all, the question of who should be the authority to impose and modify dispositions is examined. The second Comparative Analysis focuses on the issue of duration of dispositions, considering what time limits should be applied to dispositional orders and the court's continuing jurisdictional authority. The next question to be considered relates to what procedures should be employed in the dispositional hearing. And, the final Comparative Analysis discusses the subjects of the right of the juvenile to receive services and the obligation of the correctional agency to provide services.

An appendix to the volume contains three short memoranda which address other topics in this area. Though far from comprehensive, these papers focus the reader's attention on the relevant issues. The first considers the authority of family court judges to determine intake policies and guidelines for intake decision-making. Another describes procedures for increasing the court's concerns for public input and restitution. And, the last explores the authority of family court judges to obtain necessary services for court clientele.

Acknowledgements are gratefully made to: Professor Fred Cohen of the State University of New York at Albany's School of Criminal Justice, Pat Pickrel of the Institute for Judicial Administration/ American Bar Association Juvenile Justice Standards Project, Mr. Ed Budelmann, and their research assistants Marilyn Chandler and Joseph Adams, who prepared a draft of the overview memorandum; to Professor Fred Cohen, who drafted the Comparative Analyses on dispositional authority and dispositional procedures; to Tim McCaughey and Mark Millenacker, research assistants with

the American Justice Institute who prepared the Comparative Analyses on duration of dispositions and the right to treatment; and to the Honorable Ted Rubin who authored the short papers in the appendix.

All of the materials were, however, revised by the American Justice Institute, which bears responsibility for any errors or omissions.

# OVERVIEW AND STATEMENT OF CRITICAL ISSUES REGARDING JUVENILE DISPOSITIONS AND CORRECTIONS

The purpose of this overview is to aid members of the Task Force in the identification of the major issues in juvenile corrections and to pose alternative approaches to these issues as an aid to decision-making. We do not intend this document to serve as a substitute for the Comparative Analyses and, indeed, would have preferred to have those Analyses available at this time.

The problems encountered in preparing the Comparative Analyses relate to the relatively brief time available for the task and the fact that in many instances a states' juvenile code either is silent or ambiguous on crucial points and what is sought may be dealt with in judicial rules or, more likely, in difficult to locate administrative regulations. In other words, statutory analysis as such, even when done exhaustively and thoroughly, is not likely to give an accurate picture of a given jurisdiction's rules, to say nothing of its actual practices.

Without more then, we shall proceed to set out and deal briefly in narrative fashion with what appear to be the crucial issues. These appear to be the issues on which some position must be taken before particular Standards can be prepared for your consideration.

## I. What should be the general purpose or purposes of a disposition?

Brief Comment:

Most juveniles codes, and most of the existing standards or model acts, state that a disposition is to be made "in the best interests of the child and for the protection of the community." The Illinois Unified Corrections Code is a notable exception in that it recognizes a need to prescribe sanctions appropriate to the seriousness of the offense and permit the recognition of differences in rehabilitation possibilities among individual offenders and to restore offenders to useful citizenship.

The Juvenile Justice Standards Project (hereinafter, JJSP) takes yet another approach:

"The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and developing individual responsibility for lawful behavior."

However the statutes have been framed, it is clear that the benevolent purpose or rehabilitative ideal has dominated juvenile

corrections in this century. By dominated, we mean that the structure of dispositions, the allocation of discretion, the roles assigned the key participants, and the nature and duration of dispositions take their cue from rehabilitative objectives. We find, for example, that a premium is placed on expertise, that an identity of interest is said to exist between the State and the child (this has enormous implications for the amount of adversariness deemed appropriate), and that dispositions are age-based rather than offense-based. The latter provision clearly points up the rehabilitative ideal and also illustrates a rather mixed causal cure theory: delinquency can be viewed as some sort of condition in need of an indeterminate disposition in order to accommodate the search for a "cure." We use the term "mixed" here because the indeterminacy is not complete, the State losing jurisdiction when the juvenile attains majority.[1]

We fully recognize that it is for the Task Force to decide these issues but we also think it might be useful to put before the members a suggestion, if only to begin discussion. Thus we suggest the following language:

"The purpose of a disposition is to reflect the relative seriousness of the adjudicated conduct and within the limits of the allowable disposition to facilitate the juvenile's opportunity to avoid repetition of such conduct and to provide services and growth opportunities consistent with the individual needs and desires of the juvenile."

This language reflects an equity principle designed to provide both a ceiling for dispositions and consistency among offenders. It also reflects a commitment to individualization within the ceiling as well as a commitment to provide needed services. There are, of course, other options and other ways to phrase these thoughts and other options certainly may be presented orally and then discussed.

II. How is dispositional-correctional discretion to be allocated?

Brief Comment:

Flowing from a statement of objectives, is the question of how to allocate dispositional-correctional discretion? More particularly, we must focus on the legislature, the courts, and correctional administrators to determine who makes what decisions, when.

---

[1]In civil commitment law, a mentally ill or retarded person can in fact be under the authority of the State for life or until "cured," "rehabilitated," or "habilitated."

Under present law, there generally are no offense-related distinctions made concerning the nature or duration of a disposition. The mildest and the most aggravated offenses are subject to the same dispositions and the juvenile is subject to State authority until he or she attains majority. (A few states do impose durational limits but those limits are not offense-related).

If a judge commits a juvenile, then in nearly all jurisdictions the designated State authority determines the particular setting, the program, and the length of stay. If the judge resorts to a community disposition (fine, restitution, probation, etc.) then the judge retains the sort of authority ceded administrators when commitment is ordered.

Thus, under present law the legislature plays only a nominal role with either the judge or the correctional authority--depending on the disposition selected--assuming the major roles.

There are many options available to the Task Force, certainly including the present allocation of discretion. Another option is to recommend that the legislature limit the nature and duration of a disposition in accordance with the seriousness of the offense. To accomplish this, there would need to be a classification of offenses by seriousness (Grade A, B, C, D, etc.) with a parallel listing of available dispositions.[2]

At the other extreme, another option is to impose dispositions based on some judgment concerning the seriousness of the juvenile's "condition." That is, one might view acts of delinquency as indicative of some pathology and require that judges provide more time for the more seriously "ill."

Between an offense-related and condition-related approach are numerous variations and combinations in the architecture of dispositions. The legislature could fix mandatory minima for some or all offenses; minima could be discretionary with the judge with legislative guidelines for the exercise of discretion; separate terms could be assigned to custodial and probationary-type dispositions; maxima could be assigned that are neither age-related nor offense-related.

Unless the Task Force opts for some form of fixed and mandatory dispositions, then some decision must also be made concerning discretionary release short of full term. Proposals here vary from the creation of a juvenile parole board, to release by the state agency or individual facility (the dominant practice today), to release by the committing court.

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[2]The Task Force may wish to break with the principle that continued jurisdiction is entirely age-based. That is, if we hypothesize a relatively serious offense carrying, let us say, a maximum of 3 years custody, then it is possible to retain the juvenile beyond his or her majority. To do otherwise would seem to reward older offenders and give impetus to waiver decisions (if waiver is to be recommended in these standards).

## III. Dispositional Authority: Who or What Tribunal Shall Determine and Impose the Disposition?

Brief Comment:

Throughout this discussion we have assumed that the dispositional authority is vested in the Family (or Juvenile) Court judge. Through time there have been various proposals to confer dispositional authority on a panel of experts in human behavior (entirely consistent with the rehabilitative or treatment model); to adopt a social welfare model as in Sweden or Scotland; to empanel community representatives, either in an advisory or authoritative position; or to grant dispositional authority to a mixed group--the judge, clinicians, community people, etc.

If our assumption is incorrect, then these various proposals should be debated. We will procede here, however, on the basis of the judge as the dispositional authority.

## IV. Dispositional Procedures: What Procedures Should Govern the Imposition of Dispositions?

Brief Comment

When objectives, dispositional discretion, and dispositional authority are determined, the next question which arises concerns dispositional procedures. The statutes and existing model acts and standards are virtually silent on this issue. Historically, it is easy to understand why.

The early emphasis on a clinical-type approach to juvenile proceedings led to an obliteration of any distinction between adjudication and disposition. Facts relating to disposition and adjudication were indiscriminately mixed in that informal atmosphere that Judge Richard Tuthill, a Chicago juvenile court judge acting under the original Illinois Act of 1899, described as what he would do were it his son who was before him in the library charged with some misconduct.

Now, it is commonplace to separate adjudication from disposition; but statutory guidance on the conduct of the dispositional hearing is lacking. At the outset, it is important to determine the degree of formality or informality most appropriate to the decision. Is the juvenile's interest in liberty a sufficient interest to call for procedures which allow the juvenile to challenge, to participate, to question facts and conclusions, to have access to dispositional information; shall there be limits on information, and how information is obtained (e.g., diagnostic commitments); should the judge be required to make findings of fact and support in the record the disposition actually imposed?

These questions are representative, but surely not exhaustive, of the issues to be broached under dispositional procedures. At the outset, however, it would seem more efficient for the Task Force first to characterize the nature of the proceeding in terms of the competing interests at stake and then reach some general conclusion concerning the requisite formality or informality.[3]

From there, the issues of predisposition reports, disclosure, who must or should be present, findings, and the like will fall into place.

## V. Dispositional Alternatives: What Dispositional Alternatives Should be Available to the Dispositional Authority?

Brief Comment:

Although this issue can be approached at a number of different levels--e.g., the richness and variety of programs, community-based versus institutionally-based--the issue as posed seeks a classification scheme for dispositions. If the dispositional authority is to be limited in some fashion by the nature of the offense in the selection of dispositions, then there must be some way to describe categories in terms of increasing severity. Thus, the issue as presented is not concerned with program content or outcomes. Should the emphasis be placed on treatment or rehabilitative needs without regard to the relative seriousness of the offense then a different approach is called for. That is, one would then want to describe particular programs and perhaps assure their richness, availability, objectives, etc.

Perhaps the most traditional schema for dispositional alternatives is simply probation or confinement. We would suggest a more detailed approach, along the following lines:

I. Nominal

a) Reprimand and release
b) Suspended disposition

---

[3]It should also be noted that legal procedures have a way of developing an informal structure along with the formal structure. In adult proceedings, plea bargaining accounts for the vast majority of actual sentencing decisions.

Bargaining of a sort surely occurs in juvenile justice as well. The Task Force may wish to consider a strategy to regularize the informal dispositional arrangements. This might be a predisposition conference with specified participants discussing factual disputes and dispositional alternatives eventuating in a recommendation to the judge. The formal hearing, then, would occur when an actual disagreement exists.

II. Conditional

a) Restitution
b) Fine

III. Supervisory

a) Community service
b) Community supervision
c) Day Custody (all or part of a day or days).

IV. Remedial

No separation from home, but required attendance in such community-based programs as drug counseling, remedial education, vocational training, etc.

V. Custodial

a) Custody may be continuous or intermittent; intermittent custody may be night custody or weekend custody.

b) Levels of custody

1. Foster homes } Non-Secure
2. Group homes }
3. Secure facilities

VI. Post-Dispositional Rights and Obligations: What "Rights" Are Lost By the Juvenile and What "Obligations" Does the State Incur As a Result of Any Given Disposition?

Brief Comment:

After dispositional procedures, we may wish to address the range of issues encompassed by the statement: post-dispositional rights and obligations. On the one side, we have the question of whether the State by assuming custody or control over juveniles is required to provide treatment or any given level of services. On the other side, we have the question of what the State may require of the juvenile. Both questions raise the concommitant issue of consequences or sanctions for noncompliance.

If the Task Force elects to adopt a Standard calling for a right to treatment, or treatment resembling the care and guidance expected from the family, then it should also address how to define what that means and the consequences of failure or inability to so provide.

Is a juvenile required to submit to any treatment or participate in any program deemed advisable by those in authority? Are there any limits on treatment other than "cruel and unusual punishment" (nee treatment)? Should nonparticipation be a factor in length of stay?

Might it be preferable to adopt a "least drastic alternative" approach? That is, the State would have to seek to accomplish its objectives by exhausting every means short of confinement before that disposition is available. As a variant, one could require that the disposition which is least depriving of liberty is to be preferred unless the State can show that it will not accomplish its objectives.

VII. Review of Dispositions: Should There Be a System of Review of Dispositions?

Brief Comment:

Appellate courts have not generally taken the position that they lack power to review a juvenile court disposition that is within statutory limits.[4] In a number of cases such dispositions have been reviewed and reversed, while holding the determination of delinquency to have been proper. Most are cases in which a juvenile was committed to a training school for a petty offense.

While the judicial authority may be there, there is no clear statutory authority for when and how to exercise review, nor can it be said that a body of dispositional principles or policy has been fashioned by the seemingly haphazard exercise of such review. Thus, the specific issue may be answered, yes, with a further mandate to:

a) Articulate procedures
b) Articulate objectives (e.g., the development of consistent policy and principle).

The consultant suggests that review of dispositions be divided into three distinct operations:

1. Direct appeal (i.e., a direct appeal from the disposition to the appropriate tribunal to be accomplished within a relatively short-time after imposition of the disposition.)

2. Collateral review (i.e., making habeas corpus available as a means to challenge lack of treatment, services, etc.)

3. Systematic disposition review(i.e., a statistical vis-a-vis individual review, perhaps by an independent agency to determine

[4]This is in contradistinction to the position taken by appellate courts when the issue is appellate review of criminal sentences absent a specific statute.

patterns, possible inequities, disparities, over or under utilization of certain resources, etc.).

VIII. What Role, If Any, Is There for the "Total Institution" In The Confinement of Juveniles?

Brief Comment:

This is among the most important issues in juvenile corrections. There are about 57,000 juveniles in correctional confinement in the United States. The National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standards 11.1, 11.2(4) recommended that no new major institutions for juveniles should be built under any circumstances; and that all major institutions for juveniles should be phased out in five years.

To the extent that decarceration is an important objective then it would appear that the most effective way to accomplish it is to either eliminate or severely limit the number of incarceration units that are available.

If abolition is not pursued, then the question of how much space arises. This could be stated in terms of a percentage of the juvenile population in a given jurisdiction.

IX. If Juveniles Are Subjected to Any Form of Post-adjudication Incarceration, Then What Are Their Legal Rights?

Brief Comment:

This question is intended to be the equivalent of a question concerning "prisoners rights." We will sketch in the major issues in this area as they might apply to juveniles:[5]

a) Freedom of speech and expression
b) Religious freedom
c) Freedom from racially based decisions
d) Miil, visitation, telephone
e) Rights of privacy and property
f) Rights relating to classification and transfer
g) Violations of institutional rules and disciplinary procedures
h) Grievance procedures

[5]Any discussion, however brief, of the options here would unduly lengthen what is intended only as a preliminary outline.

X. How Should Corrections Be Organized and What Are The Functions To Be Performed?

Brief Comment:

Among the issues which should be addressed are the following:

a) Should there be a single statewide agency for juveniles? If so, should this agency actually administer all programs for juvenile delinquents, including probation which, of course, is traditionally a local function?

b) If there is a single statewide department, should its jurisdiction go beyond delinquency and PINS and include all children's services whether or not a court proceeding is involved?

c) On the question of minimal services--medical, dental, education, and the like--is there a preference for developing the necessary human and physical resources within the facility or for the utilization of existing community resources?

d) Is regionalization, along the lines pursued in Massachusetts, desirable?

e) Should a statewide agency:

1) set standards for local programs?
2) fund all or some programs?
3) engage in research?
4) set what type of personnel standards?

XI. When The Disposition Is of a Conditional Nature--Probation, Aftercare, e.g.--What Substantive and Procedural Rights Apply If "Revocation" (Or the Addition of More Onerous Conditions) Is Sought?

Brief Comment:

Questions in this area include the following:

a) Must a "violation" be proved? If so, by what standard of proof, what evidence?

b) What constitutes an "impartial tribunal?"

c) Is there a right to counsel?

d) Is there a right to appeal?

e) Is it important to distinguish "probation" from "aftercare" for the above representive issues?

In sum, the above sections represent what appear to be the major issues in corrections, stated at a fairly high level of generality. There may have been some omissions but it does seem that general guidance on these matters is required before the consultants can proceed.

## Task Force Standards and Rationale

The following is a very brief summary of the positions taken by the Task Force on the issues outlined above.

### I. Purpose of Dispositions

Standard 14.1: The purpose of a juvenile delinquency disposition should be to determine that course of action which will develop individual responsibility for lawful behavior through programs of reeducation. This purpose should be persued through means that are fair and just, that recognize the unique physical, psychological and social characteristics and needs of juveniles, and that give juveniles access to opportunities for normal growth and development, while insuring that such dispositions will:

a. Protect society;

b. Deter conduct that unjustifiably and without excuse inflicts or risks substantial harm to individual or public interests;

c. Maintain the integrity of the substantive law proscribing certain behavior; and

d. Contribute to the proper socialization of the juvenile.

As the commentary notes,

> This standard is intended to encourage the development of more meaningful ways of providing rehabilitative programs while at the same time attempting to deter conduct that inflicts harm to people or property.... The standard emphasizes the need to create a system that operates fairly and equitably and that is perceived by the young people affected by it to be fair and equitable.

### II. Allocation of Dispositional-Correctional Discretion

The Task Force opted to establish different classes of delinquent acts for dispositional purposes, based on the seriousness of the offense (see Standard 14.13). It also called for legislatively-determined maxima for the type and duration of dispositions for each

class of delinquent acts (see Standard 14.14). The family court was then vested with responsibility for determining the type and duration of disposition in the individual case--within the parameters established by the legislatively-prescribed maxima (see Standards 14.8 and 14.15). It was felt that this system would facilitate equity in dispositional decisions, while providing sufficient flexibility to tailor the disposition to the individual juvenile.

## III. Dispositional Authority

The Task Force vested the authority to impose dispositions in the family court (see the Comparative Analysis on this issue in this volume of Working Papers).

## IV. Dispositional Procedures

The Task Force's position on this issue is likewise elaborated in a subsequent Comparative Analysis in this volume of Working Papers.

## V. Dispositional Alternatives

The Task Force's Standard 14.9 specifies,

> There should be three types of dispositions that a family court may impose upon a juvenile adjudicated to have committed a delinquent act. Ranked from least to most severe, they are:
>
> a. Nominal--Where the juvenile is reprimanded, warned or otherwise reproved and unconditionally released.
>
> a. Conditional--Where the juvenile is required to comply with one or more conditions, none of which involves removal from the juvenile's home; and
>
> c. Custodial--Where the juvenile is removed from his home.

Standards 14.10 through 14.12 elaborate on the nature of each of these types of dispositions.

## VI. Post-Dispositional Rights and Obligations

The issues of the right to services and the obligations of the correctional authority to provide services are discussed in a subsequent Comparative Analysis in this volume.

The Task Force did adopt the philosophy of selecting the least restrictive alternative noted above. Standard 14.4 indicates,

> In choosing among statutorily permissible dispositions, the court should employ the least coercive category and duration of disposition that is appropriate to the seriousness of the delinquent act, as modified by the degree of culpability indicated by the circumstances of the particular case, and the age and prior record of the juvenile. The imposition of a particular disposition should be accompanied by a statement of the facts relied on in support of the disposition and the reasons for selecting the disposition and rejecting less restrictive alternatives.

Standard 19.7 on the Right to Refuse Services is also relevant to the issue of post-dispositional rights and obligations.

> Although all juveniles committed to the state agency should be expected to participate in any programs or services set forth in the family court's dispositional order, the concept of "the right of the juvenile to refuse rehabilitative services" should be respected.
>
> Rehabilitative services are counseling, religious programs, student government and other activities in which nonadjudicated juveniles would not be required to participate.

## VI. Review of Dispositions

The Task Force formulated a general standard authorizing appeals for "any juvenile aggrieved by a final order or judgment" (see Standard 13.8), which might be read as authorizing appeals on dispositions--but the standard does not address the issue specifically. Standard 14.21 authorizes petitioning the family court for modification of dispositional orders because they are inequitable, because services are not provided or because of good behavior. The Task Force intended that this be the principal mechanism for redress of unduly severe dispositions.

## VIII. "Total Institutions"

Consistent with its emphasis on selecting the least restrictive alternative, the Task Force made the following recommendation regarding secure residential facilities:

> Standard 24.2: ... The precise number of secure facilities should be based on need and should be kept to an absolute minimum.

Secure residential facilities should comply with the following guidelines:

(A) They should not exceed a bed capacity of 100. The state agency should develop a plan with specific time limits to remodel existing facilities to meet this requirement or to discontinue the use of present facilities that have a population in excess of 100. No new facilities should be constructed unless it can be demonstrated that there is a need for these facilities and that this need cannot be met by any other means;

IX. Legal Rights of Incarcerated Delinquents

Standard 24.13 specifies that,

The state agency should encourage and make no undue prohibitions against communications, including visits, phone calls and letters, between delinquents in its custody and their families or significant others in their lives.

The state agency should not censor mail other than to open envelopes or packages in the presence of the delinquent to inspect for contraband materials, e.g., drugs or weapons. Nor should the state agency monitor telephone calls between the delinquent and his family or significant others.

Appropriate procedures for grievance and disciplinary proceedings are outlined in considerable detail in Chapter 20. In each of these areas the Task Force sought to provide specific mechanisms to implement the general principle that all dispositions should be carried out only through means that are fair and just and are so perceived by the juvenile.

X. Organization of Corrections

The Task Force opted for the creation of a single statewide agency with responsibility for the administration of all juvenile intake and corrections (see Standard 19.2 and the Standards in Chapter 19 generally). This agency was vested with responsibility for providing or assuring the provision of (by contracts with local agencies, purchase of service agreements, etc.) all services required to carry out the pre- and post-dispositional orders of the family court (see Standard 19.2). The agency should establish and enforce standards for all programs and engage in a variety of

overall management,coordination and research activities. The Task Force felt that this organizational structure would help to upgrade the quality of service programs and facilitate equity and uniformity in the delivery of services.

## XI. Modification of Conditional Dispositions

The Task Force focused on this issue in Standards 14.22, 23.7 and 23.8. The Task Force stipulated that a court hearing should be required in such situations and that the hearing should be "designed to afford the juvenile all the procedural protections to which he is entitled." This would of course include the right to counsel.

1. Issue Title: Dispositional Authority--Who should have the authority to determine, impose and subsequently modify a disposition?

2. Description of the Issue:

There is virtual unanimity on the importance of the dispositional decision and yet there is little in the way of reexamination of the lodging of dispositional authority with the judge (or--far more rarely--a referee). An effort to promulgate contemporary standards for juvenile justice can scarcely afford to avoid such important ramifications as the appropriate education and training for the dispositional authority, the nature of the decision, and the manner in which dispositional discretion is allocated.

3. Summary of Major Positions:

There appear to be two major positions on the issue, both having some variations on the same theme. The dominant position is to retain dispositional authority with the juvenile or family court judge. Added to this position is the not infrequent call for more judicial education in the understanding and uses of social and clinical-type dispositional information. As a corollary point, it is suggested that those jurisdictions which presently allow referees to make dispositions should terminate such practices and authorize only fully trained and qualified judges to make these decisions.

The competing position would place the dispositional decision in the hands of a non-judicial panel composed either of "experts" or lay persons, or perhaps some combination of both groups. The call for a dispositional panel composed of experts in human behavior was heard more loudly twenty or thirty years ago. Today, when a non-judicial panel is proposed, it is more likely to be for a panel of lay people from the community. This position flows from an analysis which distrusts the experts, finds the judge unlikely to be from or understand the local community from which the juvenile is likely to come, and which concludes that lay members of the local community are the most appropriate members of a dispositional panel.

Since there is virtually no experience in the United States with other than judicially determined and imposed dispositions, there is no data upon which to draw either to support or detract from the call for lay or expert panels. Recommendations for such panels derive from basic dissatisfaction with the continued use of the judiciary.

A significant hurdle in the way of any change in the exercise of judicial authority is the view that only a judicial officer may constitutionally impose the sanctions currently available in juvenile cases. In partial response to this hurdle, some argue that the panel could serve in an advisory capacity only and in that fashion reflect, as the case may be, the need for expertise or an understanding of the local community.

At bottom, the competing positions appear to turn on competing views of the nature of the decision to be made. If an adjudication of delinquency is viewed as a finding of some form of individual pathology then there is logic in a call for "clinicians" to decide on the best remedy. On the other hand, if an act of delinquency is viewed as essentially a product of social malfunction or as an inevitable by-product of the immediate culture, who could best decide what the conduct actually means and how to deal with it, other than people who are a part of that same culture?

Proponents of judicial authority argue that there is a constitutional right to a judge in such proceedings, that a disposition is and should remain a legal decision best made by a judge, and that judges by training and aptitude tend to acquire the necessary attitudes and professionalism needed to arrive at a fair disposition. As noted previously, supporters of judicial authority frequently urge more judicial education in the behavioral sciences which, when added to prior training and experience in law, is said to create the best combination now available.

On the issue of modification of dispositions, there appear to be three major positions. First, the judge should be free both to impose and subsequently modify a disposition within the limits made available by the legislature. Second, the judge should impose the initial disposition and if that disposition involves any form of coercion then an administrative agency--most often described as a state agency--should be given legal custody of the juvenile and determine the length and precise nature of the disposition. A variation on this position is to allow the judge to set either a minimum or maximum term but allow the agency to determine the precise program for the juvenile.

The third position--and one that has been gaining a measure of support in recent years--is to have the judge impose a "flat sentence," at least for some major felonies which are also acts of delinquency. This position, in effect, would deprive both the judge and the agencies of correction of dispositional discretion and place it squarely with the legislature. The most powerful arguments against this position are that this is the antithesis of the individual treatment philosophy of juvenile justice; that its acceptance would lead to "plea bargaining"; that it does not allow for subsequent changes in the individual juvenile to be reflected in a modification of a disposition; and, finally, that the legislature obviously cannot predict, based simply on an offense category, how long a term is needed for the rehabilitation of a juvenile.

4. Summary of State Practices:

In the formal sense, a judge is the dispositional authority in every jurisdiction of which we are aware. The conditional language is used because of the large number of informal dispositions which are made without judicial involvement or even knowledge. For example, the police have virtually a free hand either to ignore or simply issue a warning in cases of suspected delinquency.

Thirty-four jurisdictions, however, statutorily sanction the disposition of juveniles without court processing: Arizona, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin and Wyoming.[1]

The disposition referred to above is known variously as "may informally handle" or "informally adjust" or "informal probation." Where the judge does not actually impose the disposition, it is done either by court intake personnel or probation personnel.

It should also be noted that the current practices of an indeterminant number of states may include the imposition of dispositions by judicial officers other than judges, e.g., referees. The use of referees is explicitly authorized by statute in 28 states. Frequently these laws indicate that the referee's findings are regarded only as recommendations to the judge who then makes a final disposition.[2] But not all of the statutes are explicit on this point. And data on actual practice is virtually nonexistent.

In order to summarize current practice with regard to modification of a disposition, one must first identify two major types of disposition. Where the juvenile is retained in the community and ordered to make restitution, pay a fine, or undergo probation supervision then, typically, it is the judge who retains authority both to enforce or modify the disposition. However, if the juvenile is placed with, or committed to, a state institution, then in most states either the head of a state agency, or more often the director of the particular institution, occasionally with the use of a juvenile parole tribunal, may release or discharge the juvenile.[3] This release or discharge has meaning only with reference to the how long the juvenile may be confined and that will be until the age of majority or the statutory maximum time allowable for confinement (two years, with possible extensions is the pattern in those states with a time limit on dispositions).[4]

5. SUMMARY OF POSITIONS RECOMMENDED BY STANDARDS GROUPS*:

| IJA/ABA Standards | Nat'al Advisory Comm'n on Standards & Goals | Standard Juv. Ct. Act | Uniform Act of 1968 | HEW Legis. Guide |
|---|---|---|---|---|
| Advocates continued use of judge as dispositional authority, with additional authority to subsequently modify the disposition. | By implication, adopts the view that the judge is the appropriate dispositional authority. That is, by taking the view that dispositional proceeding should be identical to adult sentencing procedures, and calling for elimination of jury sentencing, the judge is affirmed as the appropriate authority. | No express provision, but it is clearly assumed that the judge will determine and impose the disposition. Any decree or order may be modified at any time by the court. | Refers to judge as dispositional authority but does provide for a referee who may hear cases and transmit recommendations for disposition to the judge.<br>Imposes time limits on disposition with power of earlier discharge in state department or institution of commitment. | No express provision, but it is clearly assumed that the judge will determine and impose the disposition.<br>Imposes time limits on disposition with power of earlier discharge in state department, institution, or agency. |

*The IJA/ABA Standards are the only known available Standards where there is any analysis of the issue of who should make the dispositional decision.

6. Analysis of the Issue:

In the adult system, the argument over the problem of who should determine the appropriate sentence has focused on judge v. jury sentencing or on the division of sentencing discretion between the legislature; the court; and correctional agencies, parole authorities in particular. In the juvenile system, the only real debate has centered on whether judges should retain their exclusive right to determine and impose dispositions or have such authority placed in the hands of a panel.[5] Such a panel, in turn, might be composed of experts in the behavioral sciences, lay persons, or perhaps some combination of the two.

However one decides the issue as a matter of preferred policy, it is necessary to first take a position on the appropriate nature of the dispositional proceeding. Here, two basic choices seem to compete for attention.

For those who view an act of delinquency as a symptom of individual pathology then it is an easy step to recommend the interposition of those with presumed expertise in such matters. Judges rarely are trained in the psychological or social sciences and to the extent that that sort of background is deemed necessary for arriving at an appropriate disposition, the case is made.

It is also true that judges rarely belong to, live in, or identify with those communities from which the majority of juveniles appearing before them come.

The profile of a typical American juvenile court judge is that of a male, over 50 years of age, married with children, Protestant, a law school graduate, having a long career in politics or public service, and spending less than one-fourth of his judicial time on juvenile matters.[6]

Ultimately, the case for assigning the dispositional decision to the experts turns on the existence of the assumed expertise. It might be argued that even if one could demonstrate the ability of behavioral experts to diagnose, prescribe, and prognose, the dispositional decision is a legal one and belongs with legal experts. However, there is good reason to doubt the existence of the requisite expertise, especially as it relates to the ability to predict future conduct.[7] Also, in order to be consistent, any move toward panels of experts would have to be accompanied by a heavy investment in the resources necessary to engage in the diagnostic-treatment process. Whether that investment would be made is conjectural at this point.

There is virtually no experience in this country with the use of lay panels. Scandanavian countries,[8] and Scotland more recently, have adopted a social welfare philosophy in their approach to delinquency and status offenses.[9] In Scotland, the adoption of an

overall social welfare philosophy toward children has led to the use of lay panels which perform an adjudicatory function where facts or points of law are uncontested and which perform a dispositional function in contested and uncontested cases. Panel members are lay people giving their services voluntarily, and are selected by the Secretary of State from a wide range of backgrounds and age groups in an effort to be representative of the communities they serve.[10]

It would probably be quite difficult to transplant such a system into the United States without a simultaneous and fundamental change in our approach to the delivery of services to children in general. As our juvenile system moves toward an increasingly legal format, the rather casual, non-judicial approach to adjudication and disposition found in the Scandanavian countries and Scotland becomes all the more difficult to adopt.[11]

For those who favor the idea of community in-put into the dispositional decision, and who must confront the fact that the judge retains ultimate dispositional authority, it is certainly possible to enpanel lay advisors who could study the dispositional facts and advise the judge as to an appropriate disposition. This, of course, has been done in the instance of panels composed of juveniles who advise the judge on cases, particularly traffic offenses involving young drivers.

One final point should perhaps be mentioned. If dispositional authority is vested with the court alone, a question may arise as to whether it should be exercised only by a judge or whether another judicial officer, e.g., a referee can impose or modify dispositions. The use of referees in the juvenile system has frequently been criticized on the ground that they are usually less qualified than judges. On the other hand, this practice has been defended on the grounds of economy of personnel and resources. If one views the imposition or modification of dispositions as the appropriate province of only highly trained and qualified judicial officers it might be appropriate to restrict these powers to judges only.

7. Task Force Standards and Rationale:

The Task Force addressed the issues raised in this comparative analysis in a number of different standards. Standard 14.3 provides, in pertinant part,

> A disposition is coercive where it limits the freedom of action of the adjudicated juvenile in any way that is distinguishable from that of a non-adjudicated juvenile and where the failure or refusal to comply with the disposition may result in further enforcement action.

> A disposition is non-coercive where it no way limits the freedom of action of the adjudicated juvenile and no further enforcement action can result out of the disposition. A non-coercive disposition always must include unconditional release.
>
> The imposition of any coercive disposition by the state imposes the obligation to act with fairness and to avoid arbitrariness. This obligation includes the following requirements:
>
> ...
>
> f. Judicially Determined Dispositions--The nature and duration of all coercive dispositions should be determined by the family court at the time of disposition within the limitations established by the legislature.
>
> ...

The standards also establish classes of delinquent acts for dispositional purposes, based on the seriousness of the law violation (see Standard 14.13); and, they call for legislatively-determined maxima on the type and duration of disposition for each class of delinquent acts. In addition, Standard 14.15 enumerates the appropriate criteria for the family court's dispositional decisions (which must not exceed the limits set by the legislature). And Standard 8.3 specifies that dispositional hearings should be heard only by judges, not referees or commissioners.

The Task Force considered the option of using advisory panels of lay persons to assist judges in dispositional decisions. But it found no persuasive evidence that such advisory panels enhance either the quality or the equity of dispositional decisions.

The standards recommending legislatively-determined maxima represent, among other things, an attempt to ensure equity in dispositional decisions. But the Task Force felt that within these limits, judicial determinations on a case-by-case basis were important to tailor the disposition to the individual case. The disapproval of the use of referees is one component in a series of standards designed to improve the quality of the judges on the family court bench (see Chapters 8 and 17).

The Task Force viewed not only the imposition but also the subsequent modification of dispositions as appropriately within the province of the court, rather than the correctional agency (see Standards 14.21 and 14.22). It did, however, recommend allowing reductions by the agency in the duration of the disposition, not to exceed 10 percent, for good behavior. And, it specified that at the time of the dispositional order the court may authorize the correctional agency to reduce, but not to increase, the type

or duration of the disposition. As the commentary to Standard 14.3 points out, the recommendation that dispositional authority should generally rest solely with the court is based on the analysis that,

> /A/dministrators and correctional authorities should not be allowed to alter judicially imposed sentences because this fosters the disparate treatment of similar conduct.

Footnotes:

[1]M.M. Levin and R.C. Sarri, Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States, p. 52 (N.A.J.C., 1974).

[2]Id., pp. 44-46.

[3]Information provided by Gerald R. Wheeler, Former Chief of Research, Planning and Development, Ohio Youth Commission, indicates that juvenile parole or after-care is decided by the superintendent or the staff of a facility in 62 percent of the jurisdictions, by a parole-type board (e.g., California's Youth Authority) in 23 percent and by central administration in 15 percent. Dr. Wheeler also suggests that where parole-type boards exist, juveniles tend to remain on parole or after-care status for the longest periods of time. California, e.g., keeps juveniles under such supervision for an average of 25.9 months, which is the longest average in the nation.

See American Correctional Association, Directory, p. 251 (1976) for a table listing the agency responsible for administering juvenile corrections in the U.S. and territories.

[4]Colorado, Connecticut, District of Columbia, Georgia, Maryland, New York, North Dakota, and Wisconsin have such limits. Levin and Sarri, supra note 1 at 55. The New York Legislature recently passed an Act, not signed by the Governor as yet, which would impose mandatory terms on delinquents convicted of the most serious felonies and which further requires that a specified period of time be spent in secure confinement.

[5]See Elsen and Rosenheim, "Justice for the Child at the Grassroots," 51 A.B.A.J. 341 (1965) and the rejoinder of Woodson, "Lay Panels in Juvenile Court Proceedings," 51 A.B.A.J. 114 (1965).

[6]This was derived from a study conducted for the National Council of Juvenile Court Judges and is reported in Smith, "A Profile of Juvenile Court Judges in the United States," 25 Juv. Justice 27 (1974).

[7]See Ennis and Litwak, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974) who conclude that there is no evidence warranting that psychiatrists can accurately determine dangerousness; and there is little evidence that psychiatrists are more expert than laymen in making predictions relevant to civil commitment.

[8]See P.W. Tappen, "Judicial and Administrative Approaches to Children with Problems" in Justice for the Child 144, 159-166 (M. Rosenheim, ed., 1962).

[9]McIssac and McClintock, "The Juvenile Justice /sic./ in Scotland" in Juvenile Justice: An International Survey 83 (U.N. Social Def. Research Inst., 1976).

Also see Fox, "Juvenile Justice Reforms: Innovations in Scotland," 12 Amer. Crim. L. Rev. 61 (1974).

[10]McIssac and McClintock, supra note 9 at 88.

[11]For a description of a so-called "community court" which is advisory to the judge on dispositions, see Statsky, "Community Courts: Decentralizing Juvenile Jurisprudence," 3 Capital L. Rev. 1 (1974). For a description of New Jersey's Conference Committees see D. Hublin, An Analysis of Juvenile Conference Committee of New Jersey, Feb. 1963 (unpublished Ph.D. Thesis, N.Y.U. Grad. School of Arts and Sciences).

1. Issue Title: Duration of Disposition--What should be the limits on juvenile dispositions in terms of time?

2. Description of the Issue:

This Comparative Analysis focuses on two related concerns: first, what should be the time limits on dispositional orders made by the juvenile or family court (i.e., an order of commitment to a correctional institution or an order of probation or other disposition within the community); and, second, what should be the time limits on the dispositional jurisdiction?

While not criticizing the humanistic intent of the juvenile justice system, modern commentators have questioned the system's rehabilitative abilities and pointed to the inequities that can arise in the dispositions of adjudicated juveniles. Specifically, it has been emphasized that juveniles can receive dispositions which order their commitment to correctional facilities for longer periods of time than adults guilty of violating the same laws. In addition, the fact that adjudicated juveniles can be subject to the court's dispositional jurisdiction until their majority has received increasing attention. For a ten year old, this is potentially an eleven year period in many jurisdictions--an extraordinarily long period of time.

3. Summary of Major Positions:

The different positions which can be taken on the issue of dispositional time limits are the different combinations of two variable factors: the commitment period and the limit on continuing jurisdiction.

As to commitment time limits, one can either authorize a definite, nonvariable period of commitment or custody, limited by a statutory maximum possible period; or one can establish a statutory commitment period with a provision for early release, at the discretion of either the court, the correctional institution or a board of review.

Jurisdiction can be limited in one of two possible ways. Either the court's jurisdiction can cease to exist at a certain age (thus all dispositional orders would terminate automatically at the specified age), or the jurisdiction of the court can terminate upon the expiration of the dispositional order. The latter option is subject to the further possibility of court renewal of dispositions. And, of course, the two approaches can be combined. As an example, one possibility would be an indefinite commitment period of up to two years, with a provision for renewal every two years until the age of 21, at which time all dispositional orders must terminate.

4. Summary of State Practices:

Maximum Age for Continuing Jurisdiction

| Age | Number of States | Names of States |
|---|---|---|
| 17 | 1 | CT |
| 18 | 3 | MI, NY, VT |
| 20 | 3 | ME, MS, NB |
| 21 | 41 | AL, AK, AZ, AR, CA, CO, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, MD, MA, MN, MO, NV, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV, WI |
| No limit | 3 | MT, NJ, WY |

Time Limits on Probation Period

Most states provide for an indefinite period of probation, terminating, at the latest, at the maximum age for continuing jurisdiction.

Seven states (Alaska, Colorado, Iowa, Minnesota, South Dakota, Tennessee and Utah) provide for periodic review of the probation sentence. And seven other states (District of Columbia, Georgia, Idaho, New York, North Carolina, North Dakota, and Wisconsin) put a time limit on the probation period.

Time Limits on Commitment Period

Only eight states (Colorado, Connecticut, District of Columbia, Georgia, Maryland, New York, North Dakota and Wisconsin) have statutory limits on the permissible commitment period for juveniles. These states generally provide for a two-year maximum commitment period with possible two-year extensions following a rehearing.

5. Summary of Positions Recommended by Standards Groups:

| Uniform Juv. Ct. Act (1968) | Std. Juv. Ct. Act (1959) | IACP (1973) | Model Acts for Fam. Cts. & State Local Children's Programs (1975) | Std. for Juv. & Family Courts (1966) | Legislative Guide for Drafting Fam.& Juv.Ct.Acts (1961) | St. Louis L. J. Model (1975) | Recommended IJA/ABA (1975) |
|---|---|---|---|---|---|---|---|
| Two-year maximum on all disposition orders with possibility of discharge at any time.<br><br>Court can periodically renew the two-year period.<br><br>All orders terminate automatically at age 21. | Three-year maximum on custody order, with possibility of discharge at any time.<br><br>Court can periodically renew the three-year period.<br><br>Jurisdiction, once obtained continues until age 21, unless terminated prior thereto. | Only addresses issue of adjudicatory jurisdiction--jurisdiction of juvenile court terminates at age 18. | One-year maximum on all disposition orders with possibility of discharge at any time.<br><br>Court can periodically renew the one-year period.<br><br>All orders terminate at age 19. | Three-year maximum on custody order, with possibility of discharge at any time.<br><br>Court can periodically renew the three-year period.<br><br>All orders to terminate at age 21. | One-year maximum on all disposition orders, with possibility of discharge at any time.<br><br>Court can periodically renew the one-year period.<br><br>All orders terminate at age 21. | Maximum of 18 months or of period equal to maximum sentence adult could receive for early offense.<br><br>No provision for early release.<br><br>Jurisdiction to terminate either by ct. order, or by expiration of disposition time limit.<br><br>No age limitation for termination of disposition. | Disposition maximum according to category of offense, and whether of confinement or of probation, from class 1 offense of 24-mo. maximum of confinement, or 36 mos. of probation; to class 5 offense 2-month confinement if with prior record, or probation of 6 mos. |

6. Analysis of the Issue:

Time limits on juvenile dispositions are of significance today because of recent concern that the juvenile justice system has denied the juveniles certain constitutional rights, while failing to approach its rehabilitative ideal. The indeterminate dispositional order has historically been a major tool of the juvenile justice system. Legislatures and courts have traditionally felt that broad dispositional orders give the juvenile system the freedom to adapt to the needs of each individual juvenile.[1] A juvenile who quickly recognizes his mistake and adjusts to the mores and behavior of normal, law-abiding society can be released from an institution or the restrictions of probation after a relatively short period of time. The juvenile who fails to respond to rehabilitative treatment and maintains his delinquent ways can be kept in the rehabilitative program until he does reform, or at worst, until he reaches the statutory maximum age.

The rationale behind indeterminate dispositions has been that delinquent juveniles should be rehabilitated, rather than merely punished. Since the late 1800's, states have maintained separate systems for the disposition of juvenile offenders because of the feeling that children should not be subjected to the same harsh treatment given adult offenders, and that some effort should be made to reach the adjudicated juvenile and lead him back to the path of lawful behavior while he is still young and impressionable.

The basic question which this analysis confronts is what time limits should be placed on the dispositions of juveniles. In answering this question, various subissues must be dealt with: (1) What are the purposes of indeterminate dispositions? (2) Are the purposes of the system being realized by placing few limits on juvenile dispositions? (3) What are the alternatives in limiting juvenile dispositions? (4) Are indeterminate dispositional orders for juveniles constitutional?

This Comparative Analysis is in many respects critical of the present majority stance of employing indeterminate dispositions for juveniles. Nearly all of the commentators who have dealt with this issue in recent time have found the present system inadequate at best, or unjust at worst. What has been perhaps most significant about the problems of indefinite dispositions is the lack of concern. Courts have in recent years addressed increasingly themselves to the due process rights of juveniles, but the equal protection issue of indeterminate dispositions has not been an area of much legal debate.

Purposes of Indeterminate Dispositions

The basic purpose of the juvenile justice system in general and of its dispositions in particular is to rehabilitate the

juvenile law violator. The courts' handling juvenile matters "differ from adult criminal courts in a number of basic respects, reflecting the philosophy that erring children should be protected and rehabilitated rather than subjected to the harshness of the criminal system. Thus they substitute procedural informality for the adversary system ... and in general are committed to rehabilitation of the juvenile as the predominant goal of the entire process."[2]

Because the prime motive of the juvenile justice system is not revenge or punishment, but rather to aid delinquent children, historically constitutional due process and equal protection rights of juveniles have not been as strictly guarded as those of adults. Carried to the extreme, this position may even be read as indicating that if an error is made and an innocent juvenile is mistakenly subjected to the "rehabilitative" efforts of the juvenile justice system, while this is regrettable in that a child's freedom is unjustly denied him, it is not the same kind of serious mistake that imprisonment of an innocent adult would be. According to this view, unjustified commitment or probation in the juvenile rehabilitation program is not so serious an evil as to override society's interest in maintaining a civil rehabilitative rather than a criminal penal system for juvenile offenders.

While centering on the due process rights of juveniles, In re Gault[3] explained the reasoning behind the different treatment of juveniles:

> The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions--that is, if the child is "delinquent"--the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

This reasoning can be seen in the thinking behind indeterminate dispositions. If children have no absolute right to freedom, indeterminate commitment or probation orders that can last until the juvenile's majority violate no important rights of a child.

However, In re Gault, Kent v. United States[4] and In re Winship[5] have, of course, undercut this type of reasoning. These three recent Supreme Court cases have held that juveniles changed with delinquency

are entitled to "the essentials of due process and fair treatment." As the Court in In re Gault said,

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts...."[6]

As the Court realistically pointed out,

> It is of no constitutional consequence--and of limited practical meaning--that the institution to which he is committed is called an Industrial School. The fact of the matter is that however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater of lesser time.... Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[7]

Are the Purposes of the Juvenile System Being Realized Through Indeterminate Dispositions?

Indeterminate dispositions exist in the juvenile justice system so that the rehabilitative mechanism can be adapted to the needs of each individual juvenile. Certain juveniles obviously can be rehabilitated faster than others. Also, according to traditional rehabilitative thinking, giving a child an indeterminate period of commitment or probation places on his shoulders the responsibility of improving himself. The juvenile knows he can make his time long or short, depending upon how he behaves.

Recent commentators have questioned the rationale behind subjecting juveniles to indeterminate dispositional orders. Edward Chase in his article, "Schemes and Visions: A Suggested Revision of Juvenile Sentencing,"[8] points out that if the reasoning behind indeterminate dispositions for juveniles were logically consistent, then there would be no absolute limit on the dispositional orders given to juveniles. All juvenile dispositional statutes have maximum limits--the limit of the juvenile court's continuing jurisdiction, generally twenty-one.[9] As the statutes now read, either the juvenile is rehabilitated by the time he reaches the statutory age limit, or the juvenile system merely gives up and loses its jurisdiction. If the system were absolutely directed towards rehabilitation, there would logically be no limit on the time a person could spend in the rehabilitation system; he would be subject

to commitment until he were in fact rehabilitated, which might not be achieved until the person were well past the present age limit for the court's continuing jurisdiction.

Moreover, "actual practice under the juvenile sentencing statutes destroys the force of the argument for indeterminacy. The average confinement of nine or ten months suggests that considerations of floor space have precedence over rehabilitation. The short detentions are a tacit admission either that rehabilitation can occur significantly sooner than the statutes suppose, or that it will not work at all, suggesting that it is unnecessary to sentence a juvenile to confinement until he reaches his majority."[10]

Recent United States Supreme Court cases have questioned the value of the juvenile rehabilitation system. The Court in Kent v. United States said,

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts ... lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[11]

A strong criticism of the juvenile justice system was advanced by the Task Force Report - Juvenile Delinquency and Youth Crime:

> /The juvenile court/ has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency, or in bringing justice and compassion to the child offender. To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when the hopes are highest.[12]

According to a 1970 FBI report (Uniform Crime Reports), the younger the age group of arrestees, the higher the rate of recidivism. "Of the offenders under age 20 released in 1965, the FBI found that 74 percent of them were rearrested by the end of 1969; 71 percent of those aged 20 to 24 years of age; and 65 percent of the

offenders 25 to 29 years of age."[13]

What are the Alternatives In Limiting Juvenile Dispositions?

William W. Crain in an article entitled "Indeterminate and Determinate Time in the Treatment of the Adolescent Delinquent"[14] discussed the results of a program in which he was involved, where adjudicated delinquents, 16 to 18 years of age, who were involved mainly in property offenses, were given commitment dispositions of five months. The conclusion Crain drew from the results of his program was that determinate rather than indeterminate dispositions were more effective in promoting the rehabilitation of the juveniles. "Contrary to the 'creating anxiety' theory /i.e., where juveniles are told that their behavior determines how long they will be committed to an institution/, we hold the view that growth may well occur best in a situation where time anxiety, at least, is minimized."[15] Crain raises points which seem to negate the therapeutic value of using time as a disciplinary/rehabilitative tool.

It has been Crain's experience that the relationship between the juvenile and the institution is radically changed by setting a definite, non-changeable (except for serious violations such as serious assault--not minor fights or running away) period of time as a juvenile's period of confinement to the institution. The juvenile no longer views the officials of the institution as persons whom he has to obey because they can extend his sentence. The therapist's role changes from one of recommending longer or shorter commitment for a juvenile to one whereby he can devote his full effort to rehabilitating the minor. The other adult personnel no longer have the threat of extending the juvenile's commitment time as a disciplinary weapon. According to Crain, the staff is forced to approach each child from a less threatening position. "Our observations suggest that, in this respect, the individualization process has been accentuated."[16]

A more deeply psychological but very real effect of the determinate dispositions in Crain's program has been the instilling of trust in the institution, thereby reducing mutual friction.

> We are indeed proving that we will do as we say, and that minor, even regular, misbehavior will not sway us from our position. Thus, we see ourselves as reducing the boy's masochistic tendencies to 'prove' we are persecuting or unfair, reducing this by taking away his most basic weapon, that is forcing us to add time.[17]

An order of indefinite probation may, however, be viewed differently from an order for indefinite commitment. When a juvenile is placed on probation, though he is subject to various restraints on his behavior, his immediate liberty is not denied him in the same manner as it is when he is committed. Probation is by its very nature a "test" of the individual to see if he is

capable of living in society. As a result, the same resentments of the child are not necessarily bound to arise under probation as under commitment. The child's probation officer does not confront the child in either the same manner or with the same frequency as do the authority figures in a commitment situation. Nor is there the same daily disciplinary pressure in probation as there is in commitment. Thus, the argument Crain has developed against the indefinite commitment order may have less force in dealing with the issue of indefinite probation dispositions.

Are Indeterminate Dispositional Orders for Juveniles Constitutional?

Edward Chase, in his article referred to above, took the Texas case of Smith v. State[18] as illustrative of what he views as the faulty reasoning of which courts have been guilty in their dismissals of equal protection challenges to the indeterminate dispositions for juveniles.

This commentator argues that indeterminate dispositional orders for juveniles can logically be challenged on an equal protection basis because a classified group of persons is subjected to potentially longer commitment orders than are other persons for similar offenses. The differential classification is defended on the ground that juveniles, because of their youth, should be isolated from adults in terms of both procedure and disposition.

According to constitutional law principles, the state may endorse discriminatory practices against a certain group of people when there is some rational relationship between the discriminatory practice and a valid governmental objective. However, if the discriminatory practice involves a "suspect classification" (such as race, creed, color or religion) or a "fundamental right" (such as the right to practice one's own religion, the right to free speech, the right to procreate), then the discriminatory practice must meet the more arduous "strict scrutiny" standard--the practice is unconstitutional unless it is necessary to promote a compelling state interest.

In Smith v. State, the Texas court dismissed the appellant's equal protection challenge by denying that the strict scrutiny standard should be applied--i.e., denying that there was either a fundamental right or a suspect classification involved in the indeterminate sentencing of juveniles. The Texas court noted that age is not a suspect classification. In dismissing the fundamental right issue the court said, "Apparently, it has not been thought that the possibility of a longer period of confinement, standing alone, calls for a strict standard of review."[19]

The court suggested that the fact that the legislative purpose of the statute in question was to benefit the affected class was a sufficient basis to ignore the stricter standard of equal protection

review. In noting the legislative purpose of benefiting society in general, the court focused on a distinction prominant in all the different constitutional challenges to the indeterminate dispositions for juveniles--the courts will look with greater favor on legislation intended to benefit persons rather than to discriminate against them.

According to Smith, the equal protection test under which the indeterminate sentencing statute must be tested is the "rational relationship" standard: Are there any facts which "may reasonably be conceived which would sustain the rationality of the classification?"[20] The answer is, of course, that there are such conceivable facts--an indeterminate disposition gives the juvenile system the flexibility to adapt to the individual rehabilitative needs of each juvenile subject to its jurisdiction. The key word to be noted in this equal protection test is "conceivable." It is undoubtedly conceivable that the indeterminate sentencing of juveniles serves some rational relationship to a valid state purpose. But, as noted earlier in this Comparative Analysis, numerous commentators have indicated that the actual existence of that relationship is subject to much doubt.

In dealing with the more lenient, "permissive review" standard of the equal protection examination, the Texas court commented, "Perhaps the most important practical effect of this method of inquiring into the reasonableness of a classification is that it places upon the person attacking the statute the burden of demonstrating that the classification is utterly lacking in rational justification."[21]

The court noted that the rational relationship does not have to in fact actually exist, "It is true that some or all of these conclusions /as to a rational relationship between the means and the desired end/ are based on sociological, psychological and penological theories which are not universally agreed on among so-called social scientists, but the fact that eminent scholars believe such theories to be valid prevents us from branding them as palpably irrational."[22]

The court noted the existence of recent criticism questioning the efficacy and value of the juvenile justice system vis-a-vis the adult penal system, but claimed deference to the Texas legislature. The court refused to question the value of the juvenile system on its own motion. It did indicate, however, that such evaluation might have been proper had it been presented to the court. If it had been shown to the court that

> ... what is called rehabilitative treatment is indistinguishable from ordinary penal confinement ... then, perhaps, a court would not be unwilling

> to cut through the verbal camouflage and condemn the system because of the exposed realities.[23]

However, because no evidence was presented to the court questioning the efficacy of juvenile commitments, the court indicated that it could not address itself to that issue.

Some commentators argue that the Smith court ignored the impact of In re Gault. As noted earlier, Gault decided that the basic due process protections afforded adult criminal defendants must be given to defendants in delinquency cases. Therefore, it can be argued that the equally "fundamental" equal protection rights of adult criminal defendants should be given to juveniles. Under this analysis the state would be required to show how indeterminate dispositions for juveniles are necessary to promote a compelling state interest.

Another challenge to the constitutionality of indeterminate dispositions for juveniles centers on the issue of cruel and unusual punishment. In the past, petitioners' claims that the indeterminate dispositional orders for juveniles are cruel and unusual because they subject them to potentially longer sentences than are possible in the adult penal system have been dismissed on the basis that a juvenile disposition is not punishment; it is rehabilitation. In a challenge to the Federal Youth Corrections Act, a federal court said, "The Youth Corrections Act reveals a statutory scheme directed toward rehabilitation and earliest possible release. Commitment is 'in lieu of the penalty of imprisonment.' Sentence under the Act is an effort to aid the defendant by giving him the benefit of its specialized and selective treatment."[24] As indicated above, it is this same aid/rehabilitation vs. punishment reasoning that is used in dismissing the strict scrutiny equal protection challenges to indeterminate dispositions for juveniles.

United States v. Daucis,[25] is interesting in its dismissal of the petitioner's claim that his disposition under the Youth Corrections Act violated the constitutional prohibition against cruel and unusual punishments, because rather than focus on the rehabilitative nature of the juvenile treatment, the court said that the sentencing judge "was clearly making an effort to aid Daucis rather than to inflict a heavier punishment."[26] By "aid" the federal appellate court meant that the trial judge was trying to make Daucis' sentence lighter. Whereas under the adult penal system, Daucis could have been sentenced for up to five years, with no possibility of parole until after 18 months, the Youth Corrections Act provided that a person indeterminately sentenced under the act could be paroled at any time. Also the appellate court noted that the trial judge, by using the provisions of the Youth Corrections Act "ameliorated the hardship which could result from imprisonment with criminals and instead made available the specialized and selective institutions for young offenders ...."[27] The court thus looked not

at the statute itself, but rather the motivation of the sentencing judge. Moreover, the court did not examine the potential for abuse, but instead looked to the apparent motivation of the disposition.

A basic critique of the judicial approach toward equal protection challenges to indeterminate dispositions for juveniles can also be useful in analyzing the judicial negation of the cruel and unusual punishment challenge, since the courts' reactions to both constitutional arguments are based on the same assumptions.

Courts have consistently thrown out constitutional challenges to the indeterminate commitment and/or parole of juveniles, reasoning that since these dispositions are for the juveniles' own benefit, the courts will not say that the legislature can't provide means to help the children, even when the use of such indeterminate dispositions may mean that the juveniles will be committed to an institution longer than they would have been had they been sentenced under the regular adult penal code.

Numerous commentators have taken issue with this position. For example, Edward Chase has argued that such thinking ignores reality and entails numerous dubious assumptions:

> Rehabilitative theory then justifies its subjection of the juvenile offender to rehabilitative treatment on the ground that offending conduct is evidence of psychological need; it justifies its subjection of the juvenile offender to rehabilitative treatment on the ground that he is most capable of reformation. The validity of these correlations is the equal protection issue.[28]

In noting the inequities in the juvenile offender classification, Chase says rehabilitative theory holds the basic tenet that all offenders need rehabilitation, not only juveniles. He also offers evidence to indicate that the age classification ("juveniles" vs. "adults") is defective "because any fixed age line is an artificial index of the mental disposition for change at which rehabilitative theory aims."[29]

The third problem Chase sees with the separate classification of juveniles is that not all juveniles need rehabilitation; "many are exceedingly normal given the conditions of their existence."[30]

Thus, it is argued that one of the key problems with the "juvenile" labeling in general, and more particularly with indeterminate dispositions is that the system is overinclusive--children not within the intended target class of rehabilitation are nevertheless subjected to the indeterminate dispositions.

Thus, it can be asked, for example: What kind of "rehabilitation" can the juvenile system provide the draft card burner protesting the Viet Nam War as in United States v. Daucis?

7. Task Force Standards and Rationale:

The Task Force opted to limit the duration of dispositions in two ways. First of all, Standard 14.2 indicates that,

> The family court dispositional authority over a juvenile who has been adjudicated a delinquent should not exceed the juvenile's twenty-first birthday.

This standard establishes an absolute ceiling on the court's continuing jurisdiction over any juvenile. (Elsewhere the Task Force set the maximum age for the family court's adjudicatory jurisdiction in delinquency cases at 18--see Standard 8.3).

Moreover, the Task Force established classes of delinquent acts for dispositional purposes (see Standard 14.13). These were based on the severity of the offense, ranging from Class I (misdemeanors) to Class IV (major felonies). Limitations on the duration of dispositions for each class of delinquent acts were then specified. Standard 14.14 establishes the following limitations: for Class I--8 months, with a possible 4 months' extension for additional supervision: Total jurisdiction not to exceed 12 months; for Class II--24 months, with a possible 6 months' extension for additional supervision: Total jurisdiction not to exceed 30 months; for Class III--36 months, with a possible 12 months' extension for additional supervision: Total jurisdiction not to exceed 48 months; for Class IV--a period not to exceed the juvenile's twenty-first birthday.

The commentary to this standard states,

> The limits proposed by this standard are derived from (1) the kind and duration of sanctions actually imposed in delinquency cases; (2) regard for the developmental situation of the juvenile delinquent; (3) the demonstrated adverse effects of long-term confinement or institutionalization; and (4) skepticism regarding both the accuracy of predictions of delinquent behavior and the ability of custodial treatment durably to prevent such behavior.

The standards also require the family court to specify the duration of the disposition as a part of its dispositional decision and indicate that this period must not exceed the maximum for the applicable class of offenses outlined above (see Standards 14.8 and 14.15). In general, then, the Task Force rejected the use of indeterminate dispositions and opted to establish fixed time limits on all dispositions.

Footnotes:

[1]See, e.g., Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); Cunningham v. U.S, 255 F. 2d 467, 472 (5th Cir. 1958); Abernathy v. U.S., 418 F 2d 288 (5th Cir. 1969).

[2]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, 1 (1967).

[3]387 U.S. 1 (1967). Gault held that a juvenile charged with a delinquent act which would be a crime if committed by an adult has a right to counsel, notice of charges, confrontation and cross-examination, and to privilege against self-incrimination.

[4]383 U.S. 541 (1966). Kent held that a valid waiver of juvenile court jurisdiction in favor of adult criminal jurisdiction requires a hearing, access to social records and probation reports, and a statement of reasons for the waiver.

[5]397 U.S. 358 (1970). Winship held that proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

[6]387 U.S. at 18.

[7]Id. at 27.

[8]51 Texas L. Rev. 673 (1973).

[9]See "Summary of State Practices," supra.

[10]51 Texas L. Rev. at 703.

[11]383 U.S. at 555-56.

[12]Task Force Report, supra note 2, p. 7.

[13]International Association of Chiefs of Police, Juvenile Justice Administration (1973), p. 32.

[14]26 Fed. Probation, Vol. 3, 28 (1962).

[15]Id., p. 31.

[16]Id., p. 31.

[17]Id., p. 32.

[18]"Schemes and Visions: A Suggested Revision of Juvenile Sentencing," 51 Texas L. Rev. 638 (1973).

[19]444 S.W. 2d 941, 947 (Tex. Civ. App.--San Antonio 1969, writ ref'd n.r.e.).

[20]Id., at 944.

[21]Id., at 945.

[22]Id., at 945.

[23]Id., at 948.

[24]McGann v. United States, 440 F. 2d 1065, 1066 (5th Cir. 1971).

[25]406 F. 2d 729 (2d Cir. 1969).

[26]Id., at 730.

[27]Ibid., at 730.

[28]51 Texas L. Rev. at 686.

[29]Id., at 687.

[30]Id., at 687.

1. Issue Title: Dispositional Procedures--What dispositional procedures are appropriate for juvenile proceedings? In particular, when should the hearing be held; if predisposition (social) reports are used, when should they be prepared; what information should they contain; to whom should they be disclosed; what should be the procedural format for such hearings; and should the judge make findings concerning the disposition selected?

2. Description of the Issue:

Dispositional procedures, certainly when compared with the level of attention focused on substantive dispositions and outcomes, have received scant attention. This is true whether the focus is on judicial opinions, legislation, standards-setting projects, or scholarly writing. Consistent with the early assumptions and architecture of the juvenile court, dispositional proceedings were--and have remained--extraordinarily casual and standardless proceedings. Indeed, it is only recently that there have been efforts to separate the adjudicatory and dispositional phases.

Thus, the question is whether such proceedings should remain at their present level of informality or whether some legal standards for the conduct of such proceedings should be imposed. Ultimately, specific provisions will be deemed appropriate or inappropriate depending on one's conception of the dispositional decision. If the decision is deemed to be a highly individual and discretionary one, one that more resembles a clinical assessment of the juvenile than an assessment of "blame," the preference will be for maximal discretion and informality. On the other hand, if the decision is characterized as "legal," as involving the possibility of coercion, deprivation of liberty, and little hope for successful "treatment," then one is more likely to prefer a more adversary-type format. The opportunity to resist official intervention, in other words, will be viewed as critical as opposed to a format which is collaborative and where the dispositional decision is a search for the presumed best interests of the child.

3. Summary of Major Positions:

There are basically two major positions on the question of just how formal dispositional proceedings should be. The dominant position is supportive of an informal proceeding, with few if any limitations on the nature and amount of information used. Proponents of this position are also likely to favor regular, if not required, use of predisposition reports, and they may or may not be supportive of disclosure to the child or counsel.

As stated in the previous section, this position flows from a conception of a disposition as a highly individual decision which is in the nature of a clinical assessment. Thus, more, as opposed to

less, information is preferred; experts are viewed as helpful participants, and all barriers to a complete assessment of the juvenile and his needs are opposed.

The contending position views with dismay the current standardless and casual approach taken to dispositional proceedings. The dispositional outcome is characterized as involving the potential for a loss of liberty, the imposition of stigma, and, where institutionalization is involved, increasing the potential for a later career in crime. Thus, proponents of an adversary-type format view the proceedings as involving potential adversaries and not as a get together of friendly collaborators.

Particular procedures are urged on the basis of providing the juvenile and counsel with an opportunity to resist an authoritative disposition or to influence the disposition in the direction of that which is least depriving of liberty. Thus, disclosure of all dispositional information would be urged; as would limitations on dispositional information, a binding standard of proof and findings by the judge supportive of a particular disposition.

Both positions appear to prefer the separation of the adjudicatory hearing from the dispositional hearing, but for obviously different reasons. It is also possible for a proponent of relaxed procedures to urge judicial findings supportive of a disposition but this would be based on the belief that this would force the judge to be more attentive to "treatment" needs. The adversary-type proponent would seek findings on the basis of a need to justify a more onerous disposition where a less liberty-depriving option was available.

4. Summary of State Practices:

In general, one can state with assurance that in every jurisdiction dispositional proceedings are far more informal than adjudicatory hearings. Also, in every jurisdiction of which we are aware, there is an effort to separate the adjudicatory and dispositional hearings, although the dispositional hearing may be held immediately after the adjudication. Some type of hearing, however casual, is conducted although the hearing may more nearly resemble a brief interview ("Do you have anything to say before I announce the disposition?").

Since the proceeding is very much in the control of the presiding judge, one will find great variations in the practice of individual judges. Some judges, for example, will be more circumspect in the admission of hearsay evidence, some will allow counsel for the juvenile great leeway in challenging and presenting evidence while others will greatly inhibit counsel's role at disposition.

Counsel for the juvenile, especially since Kent and Gault, increasingly participate in the dispositional hearing, although appearances by prosecutors remain relatively rare. Probation staff,

or the judge alone, tend to represent the official view of a preferred disposition.

The juvenile is everywhere afforded the right to be present at the hearing, although this is not a right that is expressly noted in many of the juvenile codes. When material which is deemed harmful to the juvenile is to be presented, the judge traditionally has the right to exclude the youth during that aspect of the hearing. The juvenile's representative would, of course, remain present. Whether or not the juvenile's parents or guardian should or must be present is a divided affair. The right to be present and heard is more often the rule than a mandatory requirement of appearance.

The use of predispositional reports is quite common and, in the past few years, disclosure of their contents to counsel, or the juvenile, has also become fairly common. The length, content, and quality of such reports varies so greatly that no summary seems possible.

Specific findings by the judge, either of dispositional facts or conclusions about the disposition imposed, remains a relatively rare requirement and practice.

An effort has been made to analyze the statutes and rules of court for each jurisdiction in order to present in summary fashion the position of each jurisdiction on particular issues of dispositional procedure. Before presenting that data, it is necessary to make several qualifying statements. First, most of the laws surveyed either are silent on the issue or so ambiguous that in many instances it was necessary to make a highly subjective judgment as to the position in that jurisdiction. A persistent problem is whether or not a procedural referent is to adjudication, disposition, or both.

Second, in many instances case law, and not statutes or rules of court, will govern the area under discussion. Time did not permit a thorough search of the case law for each jurisdiction but in a few instances a leading decision was used to fix the position of the jurisdiction.

Third, the reader should assume that the constitutional right to counsel established in Gault is a right to full and effective assistance, and a right which necessarily includes both the adjudicatory and dispositional stages. Thus, even if there is no specific mention of the presence and participation of counsel for a specific aspect of dispositions, it is safe to assume that counsel for the child has a right to be involved. For example, there is no doubt of both the legal right and propriety of counsel to be present during every phase of the hearing, to obtain disclosure of the predisposition report when disclosure is allowed, to challenge evidence and examine and cross-examine witnesses, to make a statement even if the child or the child's parents also do so.[1]

In every jurisdiction the admissibility of evidence at a dispositional hearing is much less stringent than at the adjudicatory hearing. Hearsay seems always admissible, although the somewhat limiting phrase of "relevant and material" will be found in the law of Colorado, California, District of Columbia, Florida, Hawaii, Iowa, Maryland, Michigan, Minnesota, New Mexico, New York, Ohio and Wyoming. If the evidence is viewed as "helpful," it is admissible in Georgia, Illinois, Kentucky, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Vermont. Mississippi, Missouri, Washington, and Wisconsin appear to allow hearsay without qualification.

The remaining jurisdictions either are silent on the issue or refer to the "best interests of the child" substantive test as also being the test for admissibility.[2]

On the issue of who may be present at the disposition hearing, the statutory picture is at least as confusing as on the question of evidence. Arkansas, Delaware, Indiana, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, North Carolina, Texas, Washington, and West Virginia are silent on the issue.[3] Four jurisdictions refer only to the child's right to be present while 34 other jurisdictions refer to the child and others; the latter including counsel, parents, guardians, and guardians ad litem.

Florida and Nebraska are somewhat unique in that they require that if the parents do not respond to a summons then a guardian ad litem shall be appointed.

At least 21 states refer expressly to the right of the court to exclude the child for part of the hearing if the effect of testimony would be to cause material psychological harm. Alaska, Iowa, Minnesota, and Oregon refer to the exclusion of parents from the hearing. Oregon, in addition, refers to separate "interviews" of the juvenile and the parents. Finally, at least 23 states specifically mention the exclusion of the public from the dispositional hearing.

Concerning the right of the juvenile to make a statement, fully 38 states are silent on the matter. The District of Columbia is exceptional in specifying the child, counsel, and parents as having the right while Iowa, Minnesota and North Carolina specify the right of the child and the parents to make a statement. Other jurisdictions refer to a party or the parties' right to make a statement and presumably this includes the child and it may well include parents.

Disclosure of the social history is mandatory in Alaska, Colorado, California, District of Columbia, Kentucky, Michigan, Minnesota, New Mexico, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Virginia and Wyoming. Disclosure is discretionary as to all or part of the report and as to some of the parties in Arizona, Georgia, Hawaii, Idaho, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Vermont and Washington. Eighteen states are silent on the point.[4]

Only 14 of the 27 jurisdictions which provide for mandatory disclosure also specify that there is a right to cross-examine the person who prepared the report.

The District of Columbia and Illinois specify that the judge provide reasons for a disposition while reasons must be given if the child is placed outside of the home in Maryland, Minnesota, and North Dakota. Alaska, California, and North Carolina have requirements as to a statement of the facts relied upon. Rhode Island appears to be alone in calling for a summary of the facts when placement is outside of the home.

A few states call for general findings as to the need for care and rehabilitation while at least 30 jurisdictions are silent on the question.

## 5. SUMMARY OF POSITIONS RECOMMENDED BY STANDARDS GROUPS

| | Predisposition Reports | Timing of Hearing | Procedural Format | Evidence - Findings |
|---|---|---|---|---|
| IJA/ABA Standards | The report is discretionary and not encouraged. Disclosure to counsel is mandatory. Age, prior record, and details of present offense are considered primary with personal, social, and psychological data available but not considered necessary in each case. Investigation must await adjudication unless there is consent. | Only after adjudication | Adversarial-like with recommendation to attempt to reach "agreed upon" dispositions at a predisposition conference. Where agreement fails then child, parents or guardian, and counsel have right to appear, be heard, summon witnesses, record is to be made, compulsory process available, right to cross-examine witnesses and challenge documents, anticipates role for prosecutor at hearing, and both sides have right to make arguments on proper disposition. No reference to exclusion of child. | Must be "relevant and material." When more severe disposition is selected that choice must be supported by preponderence of evidence. Must make findings on disputed dispositional facts, indicate weight attached to all significant dispositional facts, and record reasons and objectives sought in selection of disposition. |
| N.A.C. Standards and Goals* | Mandates report for "minors" and provides general guidelines for content. May not be prepared until after adjudication unless there is consent. Disclosure to counsel is mandatory. | After adjudication | Adopts same rights for juveniles as adults at sentencing. Thus, there is right to counsel, to present evidence, subpoena witnesses, to call and cross-examine person who prepares predisposition report and others who gave "highly damaging" information, present arguments, and calls for guidelines on admissibility of evidence. As adversarial as IJA/ABA Standards. No reference to exclusion of child. | Specific findings on controverted facts and on all facts which are prerequisite to the specific disposition. All evidence should be received subject to exclusion as irrelevant, immaterial, or unduly repetitious. Sentencing decision, however, should be based on "competent and reliable" evidence and evidence obtained in violation of constitutional rights should not be heard or considered. |

*See Courts and Corrections volumes.

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## 5. SUMMARY OF POSITIONS RECOMMENDED BY STANDARDS GROUPS (Con't)

| | Predisposition Reports | Timing of Hearing | Procedural Format | Evidence - Findings |
|---|---|---|---|---|
| Standard Juv. Ct. Act | Discretionary with the judge, with general guidelines on content provided. Where allegations in petition are denied, investigation not to be undertaken until adjudication, silent on disclosure. | After adjudication, by implication. | Non-adversarial in design. Reference is simply to orders which judge may make and not to process of arriving at dispositional decision. | Nothing directly on point. |
| Uniform Act of 1968 | Discretionary with the judge, not to be undertaken until adjudication unless allegations in petition are admitted. Disclosure is mandatory except for sources of confidential information. | After adjudication | Non-adversarial format. Reference is to hear evidence on needs of child, controvert written reports, and cross-examine individuals who prepare predisposition report. | All evidence which is "helpful" may be received even though not otherwise competent. Court must find that child is in need of treatment and rehabilitation and this finding must be on clear and convincing evidence otherwise child shall be discharged. However, adjudication based on a felony is sufficient to establish need for treatment or rehabilitation, absent evidence to contrary. |
| HEW Legis. Guide | Mandates report in every case with general guidelines provided. May not be prepared until adjudication unless there is a notice of intent to admit allegations and there is consent. Mandatory disclosure except for sources of confidential information. | After adjudication | Non-adversarial format. Reference is to hear evidence on needs of child, controvert written reports and cross-examine individuals making reports when reasonably available. | All evidence which is relevant and material may be received and relied upon to extent of its probative value, even if not competent at adjudication. Court must find child is in need of care and rehabilitation by clear and convincing evidence, otherwise child is to be discharged. Findings are to be filed. Adjudication based on felony will sustain need for care and rehabilitation, absent evidence to the contrary. |

6. Analysis of the Issue:

A wholehearted commitment to either the adversarial or non-adversarial model involves a good deal of time and expense. For example, those who wish to reassert the dispositional decision as a clinical-type assessment should also be prepared to urge the collection of full social and psychological data, the increased use of observational commitments, the use of such additional experts as may be required in an individual case, and the allocation of necessary resources to effectuate the diagnosis. This is both time-consuming and costly.

The due process, or adversarial advocate, incurs costs in urging time-consuming procedural hurdles: the availability for examination and cross-examination of those who provide information, equality with the State in the availability of such experts as the State uses, opportunity to investigate and challenge alleged dispositional facts, and so on.

It is clear that the various jurisdictions are moving slowly in the direction of more procedural safeguards at disposition. The movement is not as swift or as dramatic as that stirred by Gault at adjudication, but it is clear.

What occurs, then, so far as dispositional procedures are concerned is less likely to come as a result of a major Supreme Court decision on point or as a result of legislative initiatives in the area. Rather, procedures are likely to follow legislative initiatives on the substantive issues of dispositions. New York's legislature, for example, recently passed a law which mandates secure confinement for a designated period of time for juvenile's who are adjudicated delinquent on the basis of committing the most serious felonies. Should that law be signed by the Governor, and it seems highly likely that it will be, and should other jurisdictions follow suit, it becomes difficult to argue that the State's objective is wholly benevolent and that dispositional procedures therefore should be relaxed and informal.

The IJA/ABA Standards and the National Advisory Commission independently reached similar conclusions: there is no apparent reason to provide delinquents facing a loss of liberty with fewer procedural safeguards than their adult counterparts. This analysis ultimately may be the one which prevails in finally settling on a format for dispositional procedures.

As more and more defense counsel appear and take on active roles at disposition, a great strain is placed on the probation officer and the judge when no attorney represents the State. The adversarial model easily accommodates the regular appearance of prosecutors at disposition, although there may be debate over just how far he should go in actively pushing the more severe dispositions. This, of course, is the subject of the same sort of debate in the area of adult

sentencing. Those who subscribe to the clinical, non-adversary model seem even more appalled at the prospect of the presence of prosecutors than defense counsel.

The social report issue is complex. Until recently virtually every commentator was of the view that the more information available the better, and that predisposition reports were indispensable to informed judgment. The IJA/ABA Standards express great scepticism about the proposition that more information leads inevitably to better decisions. Concerns were expressed about privacy, costs, information overload,* and the inability to relate much of the information to available dispositions.

The call for mandatory reports is still quite popular, particularly when the prospective disposition involves an alteration in custody or loss of liberty.

Disclosure of the social report, at least to counsel, seems to be an idea whose time has arrived. Whether the proceedings be characterized as clinical or as simply liberty-depriving, effective assistance of counsel would seem to include the opportunity to study, rebut if need be, and challenge asserted facts and conclusions.

The IJA/ABA Standards propose that jurisdictions experiment with predisposition conferences. This proposal is consistent with the adversary model in that it views the dispositional hearing as conducted now as largely ceremonial; as placing the judicial imprimatur on decisions previously made. Thus, it is suggested that without the judge being present, the parties attempt to negotiate an acceptable disposition and then present it to the judge for approval. If the judge disapproves, or disagrees in some material aspect, then a full dispositional hearing is held and there is, in effect, something to fight about. Even if agreement on a disposition cannot be reached, there can be stipulations on material facts, disclosure of prospective witnesses and a narrowing of dispositional alternatives; all of which may save time in court.

There appears to be a growing consensus on requiring judges to make some findings incident to disposition as opposed to simply entering an order. Proponents of both models can probably endorse this; the "clinicians" to assure full consideration of the social and psychological data; the due process proponents to assure accuracy, visibility and accountability, especially through appellate review of the disposition.

*Which is simply the inability of an individual to effectively use more than a few items of information.

7. Task Force Standards and Rationale:

Consistent with the emerging trend toward the imposition of more procedural safeguards on the dispositional process, the Task Force set forth a number of standards on this subject. Two standards speak to the subject of dispositional information and predispositional reports:

> Standard 14.5: Information which is relevant and material to disposition should be gathered by representatives of the state acting on behalf of the family court. The sources of dispositional information, the techniques for obtaining it and the conditions of its use should be subject to legal rules.
>
> Copies of the pre-dispositional report should be supplied to the attorney for the juvenile and the family court prosecutor in sufficient time prior to the dispositional hearing to permit careful review and verification if necessary.
>
> Dispositional information should be shared with those charged with correctional or custodial responsibilities, but it should not be considered a public record.
>
> The handling of dispositional information matters should be governed by the following principles:
>
> a. Investigation: Timing
>
> Investigation by representatives of the state for the purpose of gathering dispositional information may be undertaken whenever it is convenient to the correctional agency responsible, but under no circumstances should it be turned over to the court until the adjudicatory proceedings have been completed and the petition sustained.
>
> b. Questioning the Juvenile
>
> The juvenile may be questioned by representatives of the state concerning dispositional information but the juvenile should first be informed of the purpose of the questioning, the intended uses of the information, and the possible dispositional consequences which may ensue. The juvenile should have access to counsel or an adult parent or guardian upon whom he relies prior to any such questioning in order to insure voluntariness and an informed judgment concerning the providing of information.
>
> c. Information Base
>
> 1. The information essential to a disposition should consist of all details, whether in aggravation or

mitigation, concerning the present offense; the juvenile's age and identity; and any prior record of adjudicated delinquency and the disposition thereof.

2. Information concerning the social situation or personal characteristics of the juvenile, including the results of psychological testing, psychiatric evaluations and intelligence testing may be considered as relevant to the disposition.

3. Social history reports should indicate clearly the sources of information, the number of contacts with such sources and when made, and the total time expended on investigation and preparation.

4. The juvenile's feelings and attitudes concerning his present situation as well as any victim's statements involved should also be included.

d. Diagnostic Commitments

If diagnostic-type information is sought then any form of confinement or institutionalization should be used only as a last resort. A hearing should be held where it is shown why such confinement or institutionalization is necessary; and what non-confining alternatives were explored and with what result.

An order for confinement and examination should be of limited duration with a maximum of 30 days allowed. The orders should specify the nature and objectives of the proposed examination as well as the place where such examination is to be conducted.

Standard 14.6: No dispositional decision should be made on the basis of a fact or opinion not previously disclosed to the lawyer for the juvenile and any lawyer representing the state. In unusual circumstances, the judge may elect to caution the attorney not to disclose information to the juvenile if it appears that such information may prove harmful to the juvenile.

As the commentary to Standard 14.5 points out,

/T/he objective is not to discredit the collection and use of relevant data, but to challenge those who might subscribe to a "more is better" philosophy in the belief that the quality of decision-making is thereby improved.

On the subject of disclosure of this information, the commentary to Standard 14.6 indicates,

> The right of disclosure encompassed by this standard ... is based on the quarantee to a full dispositional hearing and the right and duty of counsel to rebut and challenge any facts or opinions on which a dispositional decision is made.

In general, then, the Task Force recognized the potential utility of gathering dispositional information and preparing predisposition studies, but felt that more detailed guidelines were necessary to prevent abuses in this area.

Issues related to the timing and format of the dispositional hearing are addressed in Standard 14.7.

> After adjudication, a full dispositional hearing with a record made and preserved should be held. A dispositional hearing may be conducted immediately after the adjudication hearing but not later than 30 days in the discretion of the court. The court should provide written notice to the proper parties as to the date, time and place of such hearing and do so sufficiently in advance of the hearing to allow adequate time for preparation.
>
> The parties should be entitled to compulsory process for the appearance of any persons, including character witnesses and persons who have prepared any report to be utilized by the judge, to testify at the hearing.
>
> The court should first be advised concerning any stipulations or disagreements concerning dispositional facts and then allow the representative for the state and then the attorney for the juvenile to present evidence concerning the appropriate disposition.
>
> The attorney for the juvenile and the representative of the state may question any documents and examine and cross-examine witnesses including any person who prepares a report concerning the juvenile which is before the court.

And procedural guidelines for dispositional findings and orders are set forth in Standard 14.8.

> The judge should determine the appropriate disposition as expeditiously as possible after the hearing. When the disposition is imposed, the judge should:
>
> a. Make specific findings on all controverted issues of fact and note the weight attached to all significant facts in arriving at the disposition;

b. State for the record, in the presence of the juvenile, the reasons for selecting the particular disposition and the objective or objectives to be achieved thereby, pursuant to Standard 14.1;

c. Where the disposition is other than a reprimand and release, state for the record those alternative dispositions, including particular places and programs, which were explored and the reasons for their rejection; and

d. State with particularity, both orally and in the written order of disposition, the precise terms of the disposition which is imposed, including the nature and duration of the disposition and the person or agency in whom custody is vested and who is responsible for carrying out the disposition.

The commentaries to these Standards indicate that they are intended to, among other things: (1) comply with the basic requirements of due process; (2) improve the quality of dispositional decision-making; and (3) facilitate appellate review of dispositions. Overall, the Task Force found the arguments advanced by the National Advisory Commission and the IJA/ABA Juvenile Justice Standards Project for more specific procedural safeguards in dispositional proceedings persuasive.

Footnotes:

[1]In-depth compilation of statutes and rules of court does not go further than the early part of 1974.

[2]Although the law is far from clear, Arizona and New York may be the only jurisdictions that impose a burden of proof standard--the preponderance test--on the judge in the selection of a disposition. See IJA/ABA Summary in Part 5, infra.

[3]The better legal position would seem to be that both the child and the legal guardians have a right to be present. The child's interest is obvious. In Stanley v. Illinois 405 U.S. 645 (1972), the Supreme Court held that a natural parent has a cognizable and substantial interest in the custody of his child despite the child's being born out-of-wedlock. By a parity of reasoning, if the parents' interest in continued custody is at stake then it would seem that there is a legal right to be present and heard on the issue.

New York courts consistently recognize the right of the parents to be present and heard at disposition.

[4]In some states, researchers and those with a legitimate interest in court records may be given permission to see the document.

[5]A search for statutory material on the actual conduct of the hearing bears little fruit. It is fair to say that the legislatures simply have left the conduct of the hearing in the hands of the judge with no guidance and certainly no procedural restraints to speak of.

1. Issue Title: The Right to Treatment for Juveniles--What are the rights of juveniles to services? What are the obligations of authorities to provide services?

2. Description of the Issue:

Since the inception of the juvenile court movement, juveniles have been involuntarily required to comply with dispositional orders of the court for purposes of treatment and rehabilitation rather than for penal purposes. The parens patriae doctrine has provided the needed rationale for state intervention and incarceration of juveniles. The promise of beneficial treatment and successful restoration to society has been the legislative quid pro quo justifying the resultant deprivation of liberty.

However, this promise of treatment and rehabilitation has all too often remained unfulfilled. In response the courts, both state and federal, have been recognizing a right to treatment for juveniles on statutory and/or constitutional grounds. Determining the source of the right to treatment is only the initial problem. Questions still remain with regard to the nature of the right; and the authority and competence of the courts to evaluate the adequacy of treatment; and to establish standards and remedies for enforcement of the right.

3. Summary of Major Positions :

There are a number of overlapping positions and theories; however, ultimately there are only two positions. The first major position recognizes a right to treatment, but there is disagreement as to the source of the right. Some commentators and courts have recognized the right on statutory grounds, assuming the existence of a pertinent statute. Alternatively the right has been recognized on constitutional grounds. However, there has been disagreement as to the constitutional theory to be relied upon. Some authorities have based their recognition of the right on the due process clause of the Fourteenth Amendment. Others have employed the equal protection clause of the Fourteenth Amendment. Still others see the prohibition against cruel and unusual punishment of the Eighth Amendment as the source of the right.

A second major position has been adopted by some commentators and some courts. According to this position, legal formulations of the right to treatment for juveniles are debunked in that there is no evidence to equate "hospitalization" without treatment, with punishment. Moreover, it is claimed that the courts do not have the competence to create standards for determining the adequacy of treatment. Additional problems which have been cited are inadequacy of facilities; lack of trained personnel; lack of workable standards of judicial review; inadequate sources of funding; possible state

liability for improper treatment; and possible technical insufficiency of the psychiatric disciplines.

4. Summary of State Practices:

At present, twelve states and the District of Columbia have recognized a statutory right to treatment. Six states have statutes patterned after the language of §19 of the 1952 Draft Act: "Every patient shall be entitled to humane care and treatment, and to the extent that facilities, equipment, and personnel are available, to medical care and treatment in accordance with the highest standards accepted in medical practice." National Institute of Mental Health, Public Health Service Pub. No. 51, Draft Act Governing Hospitalization of the Mentally Ill §19 (rev. ed. 1952); See Idaho Code Ann. §66-344 (Supp. 1967); Missouri Ann. Stat. §202.840 (1959); New Mexico Stat. Ann. §34-2-13 (Supp. 1967); Oklahoma Stat. Ann. Tit. 43A, §91 (1954); Texas Rev. Civ. Stat. Ann. art. 5547-70 (1958); Utah Code Ann. §64-7-46 (1953). Other jurisdictions have given tacit recognition to the right. See California Welfare and Institutions Code §6621 (West 1966), reenacted as §7251 (Supp. 1968); District of Columbia Code Ann. §21-562 (1967); Illinois Ann. Stat. Ch. 91 1/2, §100-7 (Smith Hurd 1966); Iowa Code Ann. §225.15 (1949); New York Mental Hygiene Law §86 (McKinney 1951); Rhode Island Gen. Laws Ann. §14-1-2 (1970); and Burns Ind. Stat. Ann. §9-3201, IC 1971, 31-5-7-1.

5. Summary of Positions Recommended by Standards Groups:

A. National Advisory Commission on Criminal Justice Standards and Goals: Corrections

Recognizes the right to treatment and recommends that treatment be individualized. "A rehabilitative purpose is or ought to be implicit in every sentence of an Offender (including adult offenders) unless ordered otherwise by the sentencing court." at p. 43. Emphasis added.

B. National Council on Crime and Delinquency, Standard Family Court Act

Does not explicitly acknowledge the right to treatment, but accepts the parens patriae rationale. Assumes that the primary purpose of involuntary confinement is to provide the care the juvenile should receive from his parents.

C. National Conference of Commissioners on Uniform State Laws; Uniform Juvenile Court Act

Recognizes that the rationale for the non-penal confinement of juveniles is their rehabilitation and treatment. Moreover, the NCCUSL advocates that courts refuse to order the involuntary commitment of a juvenile if it would not facilitate treatment or rehabilitation.

D. U.S. Department of Health, Education, and Welfare; Model Act for Family Courts

Endorses the right to treatment and urges individualized treatment. Accepts as an underlying principle that society has the obligation to provide services in lieu of or to supplement parents. Advocates that the full gamut of services be provided at all stages of the juvenile justice process.

E. Task Force Report: Juvenile Delinquency and Youth Crime

Recognizes the necessity and rationale of rehabilitative treatment for juveniles; but, also recognizes the limitations of the present juvenile process. Thus, the Task Force urges that emphasis be placed on rehabilitation and treatment; however, should such treatment fail, society should recognize the imperative of self-protection and develop alternative rationales for the incapacitation of juvenile offenders.

F. Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project; Standards Relating to Dispositions (Linda Singer, reporter; 1976.)

Urges recognition of the right to treatment on constitutional grounds; and, recommends that treatment be tailored to the individual juvenile. Also, recommends that the community provide the entire range of services for juveniles under the jurisdiction of the juvenile court.

G. International Association of Chiefs of Police; Juvenile Justice Administration

Recognizes the necessity of treatment and rehabilitative services. Recommends the establishment and provision of the entire range of youth services at all stages of the juvenile justice process. The IACP especially recommends preventive and diversionary programs.

H. American Psychiatric Association; A Position Statement on the Question of Adequacy of Treatment

The APA is not primarily concerned with the existence of a right to treatment. The Association focuses its attention on the evaluation of the adequacy and suitability of treatment. The APA has taken the position that the definition of treatment and the appraisal of its adequacy are solely matters for medical determination.

6. Analysis of the Issue:

As a legal issue, the right to treatment is indeed complex. The jurisdiction of the juvenile court extends to delinquents, status offenders, and neglected and dependent children. The need for treatment and services of each of these juveniles varies according to

their personal needs and the stage of the juvenile process they are in. The ability of the juvenile justice system to provide such treatment and services is presently dependent on available resources and programs, and the identifiability of the proper method of treatment. The scope of this analysis will primarily be limited to the right to treatment for those juveniles who have been involuntarily confined. Within this context, treatment and services can be defined as the benefits, assistance, and therapeutic programs provided to juveniles, who have been adjudicated and institutionalized, by state, city or local government, or by independent organizations and agencies.[1]

The stated rationale underlying the entire juvenile justice process has been the parens patriae ideal with the state acting in loco parentis to provide juveniles with the care they would normally be expected to receive from their parents.[2] Unfortunately, all too often this care and treatment has failed to materialize and the juvenile has been left with the reality of confinement without treatment. This discrepancy between rationale and reality has led to the involvement of the courts in an attempt to reconcile the two.

## I. Recognition of the Right to Treatment

### A. A Statutory Basis

The following will attempt to trace the scources for the growth of the right to treatment concept as it initially developed in the mental health field and subsequently in the juvenile justice process. Nonpenal confinement for compulsory treatment has been judicially accepted as a legitimate function of the state's police power and a proper exercise of its parens patriae role.[3] However, the treatment rationale of nonpenal confinement has slowly come under judicial scrutiny.

Perhaps the first case to consider the right to treatment concept was Miller v. Overholser.[4] The decision of the United States Court of Appeals for the District of Columbia established the propriety of habeas corpus "to test the validity not only of the fact of confinement but also of the place of confinement."[5] The court held that the intent of the District of Columbia Sexual Psychopath Act was commitment for remedial treatment. The detention of the plaintiff, a sexual psychopath, in a place maintained for the violently insane, was therefore in violation of the statute, as no treatment was provided.[6] This holding subsequently was utilized by other jurisdictions.

In Commonwealth v. Page,[7] the court examined a confining facility by means of an appeal from the plaintiff's commitment. The appeal was grounded on the fact that the treatment center, which was required by statute,[8] did not exist. While upholding the validity of nonpenal commitments, the Massachusetts Supreme Judicial Court

ruled that the remedial aspects of such confinements must have a foundation in fact; and "It is not sufficient that the Legislature announce a remedial purpose if the consequences to the individual are penal."[9] Page established the requirement of separate and special treatment facilities to validate civil commitment through statutory interpretation.[10]

In the mid-1960's attention shifted from the need for special treatment centers to an analysis of the treatment methods employed and the availability of actual treatment. This extension of judicial inquiry first came with Sas v. Maryland.[11] The constitutionality of the Maryland Defective Delinquent Statute was challenged. The appellate court upheld the act, but stated that if upon remand treatment should be found lacking, justification for indeterminate commitment would disappear, and its employment would be subject to constitutional attack.[12]

Two years later, the Maryland act was again challenged in Director of Patuxent v. Daniels.[13] Addressing itself to Daniels' argument that he had been denied equal protection of the law, the court concluded that he had received or had had available to him all the treatment techniques available to other inmates.[14] The court held that this availability elevated the confinement above mere penal detention, thus obviating any constitutional criticism.[15]

In Rouse v. Cameron,[16] the petitioner was charged with carrying a deadly weapon and found not guilty by reason of insanity. He was then committed for the treatment of his mental illness. Had Rouse been convicted of a crime, he could have been sentenced to a maximum of one year in prison. His nonpenal commitment continued for three years before he challenged his detention on the gound that he was receiving no treatment. Relying specifically upon the recent civil mental hospitalization statute,[17] the court concluded that anyone committed to a mental hospital has a right to treatment which the courts will enforce. Thus, in Rouse a clear statutory basis for the right to treatment was found. But the court went on to note that implicit in this issue were serious constitutional questions which would have been presented in the absence of a statutory mandate for adequate treatment.[18] The court suggested that the failure to provide treatment might violate the Due Process and Equal Protection Clauses and, additionally, might be subject to attack as cruel and unusual punishment.[19]

In two 1967 decisions, In re Elmore[20] and Creek v. Stone,[21] the D.C. Court of Appeals extended the statutory right recognized in Rouse, for mental patients, to juveniles. The court reasoned that a child is taken into custody by the court pursuant to an assessment that care is needed which the parent is unable or unwilling to provide.[22] This premise for court jurisdiction in turn "establishes not only an important policy objective, but, in an appropriate case, a legal right to a custody that is not inconsistent with the parens patriae premise of the law."[23]

In In re Harris,[24] a seventeen year old deaf-mute challenged his detention in a juvenile home on the grounds that he was receiving no treatment or training directed toward his disability and that the home lacked the proper personnel and facilities to furnish him such treatment. The court ordered that appropriate treatment be provided Harris at the juvenile home or alternatively that arrangements be made to transport him to special classes. The court based this order on the purpose and policy of the Illinois Juvenile Court Act, but went on to note that the failure to provide proper treatment was a violation of the due process clause of the Fourteenth Amendment and the Eighth Amendment's ban on cruel and unusual punishment.[25]

Please note that in the last four cases mentioned, the right to treatment was explicitly found to have a statutory basis. Additionally, only the last three decisions actually involved juveniles.

B. A Constitutional Basis

Absent a clear statute, the institutionalized individual must seek implied support for his right in the broader requirements of the Constitution. Chief Judge Bazelon intimated in Rouse v. Cameron[26] that the right to treatment might be constitutionally mandated.[27] Possible support for this proposition could be found in the Fourteenth Amendment's guarantees of due process and equal protection or in the Eighth Amendment's prohibition of cruel and unusual punishment.[28]

1. Substantive Due Process

The juvenile sanctions meted out are denominated nonpenal, with justification for intervention and commitment based upon the state's police power and its role as parens patriae.[29] Although the declared purpose of juvenile proceedings is radically different from that of traditional criminal law, the social sanctions usually employed are often as severe as those applied by the criminal process. Since the rationale of the juvenile process is to effect rehabilitation, fundamental fairness requires judicial scrutiny to ensure that treatment has a foundation in fact. Without such treatment, the involuntary confinement becomes a denial of substantive due process.[30] This in effect, is the substantive due process rationale for recognizing a right to treatment for juveniles.

In Nason v. Superintendent of Bridgewater State Hospital,[31] the petitioner was committed to the hospital subsequent to a determination that he was not competent to stand trial for murder. He sought a writ of habeas corpus challenging his confinement, and alleged that the lack of personnel and facilities at the hospital prevented him from receiving proper treatment. The court held that in order to overcome objections based both upon the due process and equal protection guarantees of the Fourteenth Amendment,

a program of treatment must be provided within a reasonable time. Should the hospital fail to provide such treatment promptly, the legality of his continued confinement would be put in issue.[32]

In Wyatt v. Stickney,[33] the "serious constitutional questions" of Rouse v. Cameron were transformed into an unquestionable constitutional right to treatment for mental patients confined for purposes of compulsory treatment. Wyatt was a class action by guardians of patients confined to a mental hospital. The court stressed that without treatment, the purpose of involuntary commitment could not be fulfilled. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane and therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[34] Wyatt advanced the proposition that when the state deprives the mentally ill of liberty, it must provide due process in the form of a right to treatment.[35] The reasoning of Wyatt was quite similar to that employed in Rouse; however, the latter decision recognized a statutory right to treatment while the former recognized a constitutionally based right.

This constitutional analysis has had a parallel development with respect to juveniles.[36] Martarella v. Kelley[37] was a class action brought on behalf of juveniles classified as persons in need of supervision (PINS). The juveniles alleged violations of the due process and equal protection clauses of the Fourteenth Amendment and a violation of the Eighth Amendments ban on cruel and unusual treatment.[38] The PINS had been housed, without treatment, with juveniles classified as delinquents. The court found the existence of a general right to treatment on due process grounds, citing Wyatt for the proposition that to deny liberty for therapeutic reasons and then to deny the promised treatment constitutes a denial of due process of law.[39]

Similarly, other courts have held that children confined in juvenile institutions are entitled, as of right, to programs designed to afford the rehabilitative treatment promised by the parens patriae ideal. In Morales v. Turman,[40] the federal district court recognized a statutory[41] and a federal constitutional right to treatment for institutionalized juveniles. Citing Morales, the court in Nelson v. Heyne[42] adopted the same rationale and recognized a statutory[43] and constitutional right to treatment for juveniles.[44]

2. Procedural Due Process

It has been argued that the concept of procedural due process would provide the key to recognition of a constitutional right to treatment for involuntarily confined juveniles.[45] The theory has been that juveniles are confined for therapeutic, as opposed to penal, reasons. Thus, since the sanctions being employed are non-penal, the full battery of procedural due process rights (for

juveniles) need not be observed. This has been referred to as a quid pro quo. One of the "serious constitutional questions" mentioned by the court in Rouse v. Cameron was the lack of procedural due process in commitment proceedings on the justification that commitment is for therapeutic reasons--if the therapy fails to materialize, then the justification for the relaxation of due process requirements disappears.[46]

Relative to this issue, the most important development since Rouse is the Supreme Court's decision to view confinement as confinement despite society's use of more palatable labels. Since In re Gault[47] courts have given precedence to the fact of involuntary incarceration rather than the promises and speculation about rehabilitative and therapeutic effect.[48] Procedural safeguards are required even though confinement is said to be for a benevolent purpose.[49] Thus, the procedural due process proposition mentioned in Rouse has in a sense been surpassed. Procedural due process or treatment is no longer an either/or proposition where the treatment is predicated on involuntary confinement. Juveniles, civilly incarcerated, must be given their rights under the due process clause. In re Gault would seem to hold that the factual issue of treatment or no treatment is irrelevant to the requirement of due process in involuntary commitment procedures.[50] In view of the foregoing, the procedural due process development will probably not lead to the establishment of a constitutional right to treatment for juveniles. The trend has been moving in the direction of establishing adequate procedural safeguards accompanying the commitment process to prevent future attacks on the confinement itself. Therefore, the tendency in this field is to do away with procedural arbitrariness rather than attempt to establish a new constitutional right.[51]

3. Equal Protection Clause

The equal protection clause of the Fourteenth Amendment has been invoked to challenge indeterminate confinement without treatment and the conditions of confinement. Courts have continually held that the principal justification for involuntary confinement of an indeterminate term must be the prospect of treatment.[52] This concept was elaborated upon by the Supreme Court of Pennsylvania in In re Wilson.[53] Wilson was found delinquent on charges of assault and battery; he was then committed for an indefinite period to a state correctional facility for adjudged delinquents. Wilson was sixteen and his confinement could have extended for five years, until his twenty-first birthday. Had he been tried as an adult, he could have been sentenced to a maximum of four years.[54] The court held that under the equal protection clause of the Fourteenth Amendment, a state may make distinctions only upon the basis of reasonable classifications.[55] The court went on to hold that if a state wishes to make individuals guilty of similar conduct eligible for maximum sentences of varying lengths, it must demonstrate that the distinctions which it makes are based on some relevant and reasonable classification.[56] The court then ruled that there could be no

constitutionally valid distinction between a juvenile and an adult offender which justifies making one of them subject to a longer maximum sentence for the same conduct unless three factors are present. The first two factors pertained to notice and fact finding; the third factor listed stated that "It must be clear that the longer commitment will result in the juvenile's receiving appropriate rehabilitative care and not just in his being deprived of his liberty for a longer time."[57] This decision should prove to be an invaluable precedent to insure reasonable treatment for those who receive indeterminate commitments, but also as a primary component in building the foundation of a constitutional right to treatment.[58]

4. Cruel and Unusual Punishment

Another constitutional basis for the juvenile's right to treatment is the Eighth Amendment prohibition of cruel and unusual punishment. The court noted in Rouse v. Cameron that "indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual'."[59] The amendment is certainly applicable to juvenile court acts, in view of the fact that the Supreme Court has held that even a civil statute may violate the constitutional requirements of the Eighth Amendment.[60] Unfortunately, the phrase "cruel and unusual punishment" is a nebulous term eluding exact definition. However, the Supreme Court has held that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[61]

Additionally, in Holt v. Sarver,[62] the district court held that the prohibition of the Eighth Amendment was not limited to instances in which the inmate was subjected to punishment directed against him as an individual, but could include confinement in an institution (here the Arkansas state prison system) if conditions and practices are of such a repulsive character as to shock the conscience of a reasonably civilized people.[63] This line of logic should be equally applicable to institutionalized juveniles. It is true that other goals (besides rehabilitation) of adult imprisonment such as deterrence and community condemnation may stifle any broad judicial recognition of a right to treatment for prisoners. However, under the juvenile codes, commitment is to serve no purpose other than rehabilitation.[64]

In Lollis v. New York State Dept. of Social Services,[65] the court implied that a juvenile institution may not engage in practices so cruel and punitive as to defeat the rehabilitative goal completely.[66] Fourteen-year-old Antoinette Lollis was committed to the custody of the New York Training School as a PINS. She had been confined to a "strip room" (solitary confinement) for an extended period of time. She attacked the treatment she received as being violative of the Eighth Amendment prohibition and the due process clause of the Fourteenth Amendment. The decision of the court was that the treatment received by Ms. Lollis violated the ban on cruel and unusual punishment. Upon making this determination, the court declined to rule on her due process argument.

The New York district court, in arriving at its decision, relied solely upon the Eighth Amendment prohibition of cruel and unusual punishment to declare that the confinement of the plaintiff was unacceptable according to present constitutional standards. The court did not specifically assert the right to treatment issue per se. However, the plaintiff's affidavits presented the right to treatment argument by implication, and the court seemed to accept this theory by ruling that the treatment received by Lollis was violative of the Eighth Amendment.[67] Other courts, both prior to and after the Lollis decision have utilized the same rationale.[68]

The court in Inmates of Boys' Training School v. Affleck[69] furthered the right to treatment for juveniles concept by squarely holding that the confinement of juveniles in "cold, dark isolation cells,"[70] without treatment, constituted cruel and unusual punishment.[71] The courts, both state and federal appear to be moving in the direction of finding that juvenile institutional conditions can be so "antirehabilitative" as to constitute cruel and unusual treatment, and through this reasoning indirectly recognize a right to treatment for institutionalized juveniles.

## II. Evaluating the Adequacy of Treatment

It is evident from the foregoing analysis that the courts are recognizing a right to treatment for juveniles on statutory and/or constitutional grounds. However, recognition of the right is only the initial problem. The courts are still operating without a framework of criteria or standards with which to evaluate the adequacy of the treatment being received by institutionalized juveniles. Without such a framework, the courts are left with the considerable burden of fashioning makeshift ad hoc remedies out of the most general standards. In this effort, the courts are further frustrated by an inability to correct the fundamental problem of inadequate resources underlying almost all right to treatment cases, as it is a function of the legislative power to determine the relative priorities in the allocation of funds.[72]

The problem is further complicated by scores of theories, some of which conflict, on what constitutes adequate treatment. The major criticism of the developing right to treatment is that in evaluating the adequacy of treatment the courts are overstepping the bounds of judicial competence. In fact, the American Psychiatric Association has taken the position that the definition of treatment and the appraisal of its adequacy are solely matters for medical determination.[73] Other authorities have supported the APA's view on the grounds that the evaluation of treatment adequacy and suitability may be "next to impossible in the present state of psychiatry where 'treatment' means different things to different psychiatrists."[74]

After recognizing the right to treatment, the court in Rouse v. Cameron remanded the case for a determination of the adequacy of the petitioner's treatment. The court also gave a series of instructions relating to adequacy; the court determined that the minimum requirement for adequate treatment was simply a bona fide effort to provide individualized care through periodic inquiries into the patients' needs and specialized programs of treatment.[79] The opinion went on to state that the treatment need only be "adequate in light of present knowledge."[80]

A. The Objective Approach

There has not been a truly clear line of auhtority following Rouse on how to approach the issues of lack of therapeutic standards and the nonmedical judgment of treatment. The decisions have varied widely on a spectrum of what has been called the objective and subjective approaches.[81] The objective or structural approach analyzes an institution at a macroscopic level,[82] encompassing criteria such as institution size, staff patient ratios, recidivism rates, frequency of reports, periodic revision of treatment methods to adapt them to the individual's changing needs, and percentage of patients released.[83] The records of the particular institution are evaluated alongside the established minimum requirements for the standard list of items. If the institution meets the established minimum requirements, it has established a prima facie case for the adequacy of its treatment and further inquiry into the level of individual treatment is prevented. Should the institution fail to meet these quantitative standards of care, there would be a per se violation of the patient's right to treatment. This approach was first urged by Dr. Birnbaum in his early article on the right to treatment.[84]

In Director of Patuxent v. Daniels, the court adopted the objective approach in considering the petitioner's argument[85] and made no attempt to evaluate the adequacy of his individual treatment. After analyzing the overall structure of the institution's program, the court found it above mere penal detention; especially in view of Daniels theoretical equal access to all rehabilitative programs. This same approach was utilized by the district court in Martarella v. Kelley;[86] placing heavy emphasis on objective criteria, it held that the detention center for juveniles did not provide adequate treatment for long-term inmates. The principal benefit of the objective approach is that, being quantitative in nature, it restricts the definition of adequate treatment. This prevents the court from having to choose among the various schools of psychotherapy.[87] However, there are criticisms that urge caution with respect to the use of the objective approach. This structural approach has been criticized in that there is presently a lack of reliable objective standards of what is necessary for adequate treatment.[88] In other words, the objective approach measures the quantity of therapy while the relationship between the quantity and quality of treatment is uncertain.[89] The objective approach

also fails to take into account the potential for the unequal distribution of these quantitative resources within an institution. Moreover, it fails to recognize that the possibility of successful treatment varies from patient to patient.

B. The Subjective Approach

The subjective standard is more comprehensive and relies heavily on both the Rouse and Wyatt decisions for support. This approach evaluates the facilities, staff, and resources in question to determine whether they offer "such individual treatment as will give each of the patients a realistic opportunity to be cured or improve his or her mental conditions."[90] Judge Bazelon compares the judicial role under the subjective approach to the review of an administrative agency decision. Under this logic, the court's function is not to make an independent judgment concerning the adequacy of treatment or among the various schools of psychotherapy, "but rather to scrutinize the record to ensure that an expert ... has made a responsible exercise of his professional judgment."[91] In essence this means that the institution having custody of the juvenile would be required to show that treatment is appropriate for the patient's particular problem.[92]

With regard to juveniles, the courts in both In re Elmore and Creek v. Stone employed the subjective standard to examine the nature of the actual treatment provided to the juveniles, with the court in the former case specifically directing the state to provide care that would satisfy the juvenile's particular needs.[93] In Nelson v. Heyne,[94] the court conducted an extensive subjective analysis of the treatment programs and found that the entire "program of treatment appeared to be more form than substance."[95]

C. Comments

Considerable ambiguity over what constitutes adequate treatment will persist until a clear legislative framework is established.[96] However, the legislature in turn must rely on professional expertise. The American Psychiatric Association has set down the following seven considerations as relevant in determining the adequacy of treatment:

1. The purpose of hospitalization and differences between, for example, long-term and short-term treatment programs;

2. The degree to which treatment is revised as diagnosis develops during institutionalization;

3. The need to protect the patient from self-inflicted harm;

4. The importance of interrupting the disease process, as in separating the addict from his drugs or the psychotic from his family stress situation;

5. The effective use of physical therapies;

6. The efforts to change the emotional climate around the patient, which seems to mean roughly milieu therapy and related measures; and

7. The availability of conventional psychological therapies.[97]

It is evident that courts are no longer completely willing to accept the assertions made by the juvenile institutions at face value. The rehabilitative treatment contemplated by civil commitment under the juvenile court acts is intended to serve both society and the individual and requires that the courts function as more than a conduit for the deprivation of liberty.[98] Finally, judicial scrutiny of the treatment accorded institutionalized juveniles serves a broader purpose than the results achieved in individual cases. It is critical that society be made aware of the failure of its promises so that it may make an honest choice to take constructive action or to withdraw its promises.[99]

III. Implementation of the Right to Treatment

A. Judicial Intervention

Up to this point, the analysis has been concerned with the sources and recognition of the right to treatment for juveniles, and judicial evaluation of the adequacy of treatment. Consideration now focuses on judicial intervention to implement the right to treatment. Once the courts have overcome the obstacle of determining the appropriate standard of treatment, their role should be one of supervising the treatment provided for the committed juvenile. The juvenile, who has been involuntarily confined, has the burden of showing that his classification is unreasonable or that the purpose of his commitment is illusory. If the theoretical purpose of the commitment is reasonable, the juvenile has the burden of showing that the classification is unreasonable in practice.[100] So, once the need for treatment has been demonstrated and the burden of proof successfully carried, the complaint is substantial enough to merit judicial inquiry.[101]

If the court finds that the course of treatment is inadequate, it usually has three possible courses of action. The normal course of action employed by a court consists of a transfer, of the juvenile, to another institution where adequate treatment will be administered; or an allowance of a reasonable period of time for the present institution to begin adequate treatment.[102] In some extreme cases where it appears that the opportunity for treatment has been exhausted or is otherwise inappropriate, the court may order the unconditional or conditional release of the juvenile.[103] In Rouse v. Cameron, the court felt that judicial intervention was proper to secure the statutory right to treatment for those involuntarily committed to mental hospitals. The court held that the continuing failure to

provide suitable and adequate treatment could not be justified by the lack of staff or facilities;[104] additionally, the court recognized the possibility that under certain circumstances release, either conditionally or unconditionally, might be the proper remedy.[105]

Wyatt v. Stickney advanced the notion of judicial intervention to correct the widespread denial of treatment. The court gave the defendants ninety days to (1) define precisely the mission and function of the hospital, (2) to institute an effective overall plan for treatment for all patients who "may be responsive to mental health treatment" and (3) to submit a detailed report reflecting the success of the new treatment programs.[106] This order ventured far beyond anything previously attempted in the field. By specifically retaining jurisdiction over the case, the court evidenced a willingness to enforce the patients' right to effective treatment regardless of the time element involved in achieving success.[107] Most decisions on the subject have followed an ad hoc, case-by-case approach; however, the judicial intervention advocated in Wyatt would upgrade the standard of care not only for one patient, but for all individuals in a given facility.[108] In fact, in recent years a number of important juvenile right to treatment cases have followed the Wyatt example and proceeded as class actions.[109]

In Creek v. Stone, the court inferred that judicial intervention is proper where it appears that the detention in question contradicts the purpose of juvenile confinement, and concluded that habeas corpus is the best method to obtain such intervention.[110] With respect to implementation of the right, the courts have been willing to utilize the writ of habeas corpus to forbid incarceration, effect a transfer, examine alternative courses of treatment, and to examine existing treatment programs. As such the writ provides a potent weapon for the institutionalized juvenile by producing judicial pressure to make the promise of treatment meaningful.

Within the last few years, the New York family courts have also recognized judicial intervention as appropriate to protect the rights of juveniles.[111] The use of section 762 of the Family Court Act[112] by the court, on its own motion or on that of an interested party acting on behalf of the juvenile, can produce a modification or renunciation of a prior placement which is found to be poorly advised. Some courts have been quite ready to intervene when it becomes apparent that the treatment programs have failed. Two appellate court decisions have reversed placements of Persons In Need of Supervision (PINS) in training school facilities. In In re Jeannette P.[113] the juvenile was adjudicated a PINS and placed in a state training school despite the report of a psychiatrist that the placement was improvident and could entail some risk to the juvenile. The court reversed the placement and directed that the petitioner be committed to the custody of the Commissioner of Social Services to await a more appropriate placement. Apparently the court recognized the prison-like atmosphere of the training school and the fact that

such schools cannot provide the care and treatment necessary for a juvenile adjudicated a PINS.

Similarly, in In re Ilone I.,[114] the petitioner, adjudicated a PINS, was placed in a state training school under court order directing the school to provide psychiatric care to the juvenile and to submit to the court periodic progress reports. The juvenile was seen only once by a psychiatrist, who indicated that she was not in need of psychiatric care and would not be provided with further services unless she suffered a schizophrenic recurrence. Upon discovering this, the court suggested that Ilone's legal guardian move for a termination of the placement under section 762 on the ground that she was not receiving psychiatric treatment as required by the placement order. At the hearing, upon a determination that care was not being given, the placement order was vacated, and the juvenile was placed on probation for one year. This case may have a major impact in the juvenile area in advancing the right to treatment concept. It makes clear that institutionalization in response to the proven need for treatment must provide such treatment to retain its validity.[115]

B. Damages

Additionally, monetary damages should be available to a juvenile against public officials who have deprived him of his constitutional rights. In Whitree v. State,[116] the court levied monetary damages against the state for wrongful confinement in a treatment setting. The plaintiff had been found incompetent to stand trial, and had been committed indefinitely to a state hospital. During the first six years of confinement, Whitree received only seven psychiatric examinations. After fourteen years of institutionalization, he brought suit alleging that the state had failed to meet its legal duty to give him proper treatment. The court recognized that negligent or inadequate treatment may inhibit or foreclose the attainment of competence and thereby lengthen the period of confinement. The court found that Whitree had not received adequate treatment, and that he had been wrongfully confined to a state hospital for over twelve years. Plaintiff was awarded consequential damages of three hundred thousand dollars for the deprivation of liberty. This decision has as yet not been endorsed by any other jurisdiction, but it is a clear precedent.[117] It should be noted that Whitree was not a juvenile; however, the court's reasoning would seem to be equally applicable to institutionalized juveniles who are receiving no treatment or inadequate treatment. It has been questioned whether the award of monetary damages provides the state with sufficient incentive to improve the general level of treatment.[118] However, widespread judicial acceptance of monetary awards might be a spur to legislative reform since New York paid Whitree more in damages than it would have cost to have provided him with adequate treatment.[119]

C. Alternatives

Courts are also becoming more willing to inquire into possible alternatives to total confinement, including such arrangements as hospital outpatient care, custody awards to private institutions, foster parents or home health aid services. The search for alternatives to confinement is founded on the notion that "the most basic and fundamental right is to be free from unwarranted restraint"[120] so that juveniles cannot be totally deprived of their liberty if there are less drastic means for achieving the same policy objective, i.e., treatment and rehabilitation.[121]

D. Conclusion

The courts, as we have seen, are attempting to fulfill their obligation to assure that institutionalized juveniles receive adequate treatment. Unfortunately, the limits of judicial power are apparent. Legislatures can define procedures and remedies far more precisely that can the courts.[122] If a legislature were so inclined, it could provide the sort of policy-making and enforcement apparatus characteristic of administrative agencies in order to further and protect the right to treatment.[123] Legislation would greatly enhance the effectiveness of the courts in reviewing the adequacy of treatment and in implementing the right on behalf of juveniles; however, such legislation would not be a substitute for the larger appropriations required to effectuate the right to treatment for juveniles. In fact, the real obstacle may indeed be the lack of resources appropriated for juvenile institutions and treatment programs. And there undoubtedly is a reticence on the part of state legislatures to commit larger resources for such programs. But as Chief Judge Bazelon has stated "/W/hen the legislature justifies confinement by a promise of treatment, it thereby commits the community to provide the resources necessary to fulfill the promise ... and the duty that society assumes, to fulfill the promise of treatment employed to justify involuntary (confinement) is clear."[124]

7. Task Force Standards and Rationale:

The Task Force addressed the issues raised in this comparative analysis in a number of different standards found in Chapter 14 on Dispositions and Chapters 19 through 24 in the Intake, Investigation and Corrections Section.

For example, Standard 14.3 provides, in pertinent part,

> The imposition of any coercive disposition by the state imposes the obligation to act with fairness and to avoid arbitrariness. This obligation includes the following requirements:
>
> ...
>
> g. Availability of Resources--No coercive disposition should be imposed unless the resources necessary to carry out the disposition are shown to exist. If services required as part of a disposition are not available, an alternative disposition no more severe should be employed.

This standard attempts to remedy the problems outlined above before they occur by providing that as a part of its dispositional proceedings the court should insure that the necessary resources are, in fact, available.

Moreover, Standard 14.19 stipulates, in pertinent part,

> If access to all required services is not being provided to a juvenile under the supervision of the correctional agency, the agency has the obligation to so inform the family court. In addition, the juvenile, his parents, or any other interested party may inform the court of the failure to provide the services. The court may act on its own initiative.
>
> If the court determines that access to all required services in fact is not being provided, it should do the following:
>
> 1. The family court may order the correctional agency or other public agency to make the required services available.
>
> 2. Unless the court can ensure that the required services are provided, it should reduce the nature of the juvenile's disposition to a less severe disposition that will ensure the juvenile access to the required services or discharge the juvenile.

The commentary to this standard indicates,

> Every effort should be made to insure that no child who has become subject to the jurisdiction of the juvenile court is deprived the needed services.... Requiring that such services be made available to juveniles sentenced under the juvenile correctional system is a necessary means of implementing the purposes of that system.

Standard 14.21 on Modification of Dispositional Orders reiterates this perspective. It provides, inter alia,

> The family court should reduce a disposition or discharge the juvenile where it appears that access to required services is not being provided.

In addition, Standard 14.20 on Right to Services states,

> All publicly funded services to which non-adjudicated juveniles have access should be made available to adjudicated delinquents. In addition, juveniles adjudicated delinquent should have access to all services necessary for their normal growth and development.

The commentary outlines the rationale for this standard as follows:

> When juveniles violate the law, sanctions appropriate to the violation may be imposed. This sentencing power, however, should confer no authority to create additional deprivations above and beyond those necessary, unavoidable concomitants of the particular disposition....
>
> Access to services is required to promote normalization of institutions or homes to which juveniles are sentenced, to reduce the isolation of adjudicated delinquents from the rest of the community and to ensure these juveniles the equal protection of the law. Institutions or homes to which adjudicated juveniles are committed should be no less like the community than is necessary.

The standards in Chapters 19 through 24 elaborate on the position outlined in the standards in Chapter 14. For example, the standards in Chapter 19 call for the establishment of a single, statewide

juvenile intake and corrections agency with responsibility to promulgate uniform standards for programs and facilities. (See also Chapter 22 on Detention and Shelter Care for Alleged Delinquent Juveniles and Chapter 24 on Residential Facilities for Adjudicated Delinquents.) This should serve to both upgrade the quality of services provided and offer more substantive guidance for assessing the adequacy of particular institutions or programs.

The standards in Chapter 20 which provide adjudicated juveniles access to grievance procedures to challenge "the substance or application of any policy, behavior or action directed toward the juvenile by the state agency or any of its program units," are also relevant to these concerns (see Standards 20.1 and 20.2). Intra-agency review procedures may avert the need for formal judicial reviews.

In addition, Standard 23.3 calls for the development of a services plan designed to implement the court's dispositional order for each juvenile ordered to community supervision. And, Standard 23.4 reiterates the requirement of Standard 14.19 that agency personnel should return the case to the family court if specific services ordered by the court are not available.

Footnotes:

[1]See generally, Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project. Standards Relating to Dispositions at 134. (Linda Singer, reporter; 1976.)

[2]See Ketcham, The Unfulfilled Promise of the American Juvenile Court in Justice for the Child 22, 25-26 (M. Rosenheim ed. 1962).

[3]See Robinson v. California, 370 U.S. 660, 664-65, 82 S. Ct. 1417, 8 L. Ed. 2d 758; cf. Easter v. District of Columbia, 124 U.S. App. D.C. 33, 38, 351 F. 2d 50, 55 (1966); Driver v. Hinnant, 356 F. 2d 761, 765 (4th Cir. 1966).

[4]206 F. 2d 415 (D.C. Cir. 1953).

[5]Id. at 420.

[6]Note, Persons in Need of Supervision: Is There a Constitutional Right to Treatment? 39 Brooklyn Law Review 624, 645 (1973).

[7]339 Mass. 313, 159 N.E. 2d 82 (1959).

[8]Mass. Ann. Laws Ch. 123A, §1 (1965).

[9]339 Mass. at 317-18, 159 N.E. 2d at 85. Accord, Commonweath v. Hogan, 341 Mass. 372, 170 N.E. 2d 327 (1960); Millard v. Cameron, 373 F. 2d 468 (D.C. Cir. 1966).

[10]Note supra note 6, p. 646.

[11]334 F. 2d 506 (4th Cir. 1964).

[12]Id. at 516-17.

[13]243 Md. 16, 221 A. 2d 397 (1966).

[14]Id. at 50, 221 A. 2d at 417.

[15]Daniels was released following a determination by the trial court on remand that no basis existed for his initial referral to Patuxent. See also, Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 at 1151-52.

[16]125 U.S. App. D.C. 366, 373 F. 2d 451 (1966).

[17]D.C. Code Ann. §21-562 (1967).

[18]373 F. 2d at 453.

[19]Id.

[20]127 U.S. App. D.C. 176, 382 F. 2d 125 (1967).

[21]126 U.S. App. D.C. 329, 379 F. 2d 106 (1967).

[22]379 F. 2d at 111. See also Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process? 57 Georgetown Law Journal 848, 873 (1969).

[23]Id.

[24]2 Crim. L. Rep. 2412 (Cook County, Ill., Cir. Ct., Juv. Div. December 22, 1967).

[25]Id. See also, Kittrie supra note 22 at 875.

[26]See note 16 supra.

[27]See note 18 supra and accompanying text.

[28]Kittrie, supra note 22, p. 863.

[29]Note, supra note 15, pp. 1138-39 (1967) and Ketcham, supra note 2.

[30]Rouse v. Cameron, supra note 16, p. 455.

[31]353 Mass. 604, 233 N.E. 2d 908 (1968).

[32]353 Mass. at 610, 233 N.E. 2d at 914.

[33]325 F. Supp. 781 (M.D. Ala. 1972); aff'd sub. nom. Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974). See generally, Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960).

[34]325 F. Supp. at 785.

[35]Note, supra note 6, p. 648. See also, Kittrie, supra note 22, p. 870.

[36]Davis, Rights of Juveniles. The Juvenile Justice System, p. 170 (Clark Boardman ed. 1974).

[37]349 F. Supp. 575 (S.D.N.Y. 1972), enforced in 359 F. Supp. 478.

[38]Davis, supra note 36, p. 170.

[39]349 F. Supp. at 586-590, 600.

[40]346 F. Supp. 166 (E.D. Tex. 1973).

[41]Tex. Rev. Civ. Stat. Ann. art. 5143d §1 (1971).

[42]491 F. 2d 352 (7th Cir. 1974) aff'g. 355 F. Supp. 451 (N.D. Ind. 1972).

[43]Burns Ind. Stat. Ann. §9-3201, I.C. 1971, 31-5-7-1

[44]Cf. Inmates v. Affleck 346 F. Supp. 1354 (D.R.I. 1972).

[45]Davis, supra note 36, p. 169.

[46]Mercer, Mental Health: Right to Treatment or Release? - Part 1, 5 Clearinghouse Review 290, 291.

[47]387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[48]Mercer, supra note 46.

[49]See, e.g., Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1969); and Heryford v. Parker 396 F. 2d 393 (10th Cir. 1968).

[50]Mercer, supra note 46 at 292.

[51]Note, Juvenile Law--An Important Step Towards Recognition of the Constitutional Right to Treatment, 16 Saint Louis University Law Journal 340, 350 (1972).

[52]People ex. rel. Carter v. Warden, 62 Misc. 2d 191, 308 N.Y.S. 2d 552, 555 (1970); Covington v. Harris, 419 F. 2d 617, 625 (D.C. Cir. 1969); Nason v. Superintendent of Bridgewater State Hospital, 233 N.E. 2d 908, 912-13 (Mass. 1968); Sas v. Maryland, 334 F. 2d 506, 516-17 (4th Cir. 1964); People v. Jackson, 20 App. Div. 2d 170, 174, 245 N.Y.S. 2d 534, 538 (1963).

[53]438 Pa. 425, 264 A. 2d 614 (1970).

[54]Pyfer, The Juvenile's Right to Receive Treatment, 6 Family Law Quarterly 279, 304 (1972).

[55]438 Pa. at 428, 264 A. 2d at 617.

[56]Id.

[57]Id. at 617-618.

[58]Note, supra note 51, at 349.

[59]125 U.S. App. at 368, 373 F. 2d at 453. See generally, Birnbaum, supra note 33 at 503, where the author argues that confining the mentally ill without treatment is tantamount to establishing a prison for the insane.

[60]See Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

[61]356 U.S. at 100-101.

[62]309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F. 2d 304 (8th Cir. 1971).

[63]Id. at 372-73.

[64]See Uniform Juvenile Court Act §1(2).

[65]322 F. Supp. 473 (S.D.N.Y. 1970) modified 328 F. Supp. 1115 (S.D.N.Y. 1971).

[66]Pyfer, supra note 54 at 311.

[67]Note, supra note 51 at 353.

[68]The case of In re Harris, supra note 24, also held that the failure to provide proper treatment raised the issue of cruel and unusual punishment under the Eighth Amendment.

[69]Cited supra note 44.

[70]346 F. Supp. at 1359.

[71]Id. at 1366-67.

[72]Bazelon, Forward (to Right to Treatment Symposium), 57 Geo. L.J. 676 (1969).

[73]American Psychiatric Association, A Position Statement on the Question of Adequacy of Treatment, 123 Am. J. Psychiatry 1458 (1967).

[74]Note, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L.J. 87, 104-106 (1967).

[75]373 F. 2d 451, 456 (D.C. Cir. 1966).

[76]Id.

[77]Id. at 457. See ftn. 28 of the Rouse decision at 457.

[78]Bailey and Pyfer, Deprivation of Liberty and the Right to Treatment, 7 Clearinghouse Review 519, 526-27 (1974).

[79]Note, supra note 6 at 648.

[80]373 F. 2d 451, 456.

[81]Bailey and Pyfer, supra note 78 at 527.

[82]Schwitzgebel, Right to Treatment for the Mentally Disabled, 8 Harv. Civ. Rts. - Civ. Lib. L.R. 513, 523-28 (1973).

[83]Bailey and Pyfer, supra note 78 at 527.

[84]Birnbaum, supra note 33 at 504. He has also suggested that principal reliance be placed upon the APA's "Standards for Hospitals and Clinics."

[85]See note 13 and the accompanying text.

[86]See note 37 and the accompanying text.

[87]Bailey and Pyfer, supra note 78 at 527.

[88]Schwitzgebel, supra note 82 at 523-28.

[89]Id. at 528.

[90]Wyatt v. Stickney, 325 F. Supp. 781, 784 (1971).

[91]Bazelon, supra note 72 at 678.

[92]Bailey and Pyfer, supra note 78 at 527.

[93]In re Elmore, 382 F. 2d 125 (D.C. 1967).

[94]See supra note 42 and the accompanying text.

[95]Id. at 460.

[96]Bailey and Pyfer, supra note 78 at 527.

[97]Note, supra note 74 at 110, citing from the American Psychiatric Association, supra note 73 at 1459.

[98]Bailey and Pyfer, supra note 78 at 528.

[99]Bazelon, supra note 72 at 679.

[100]In re State in Interest of K.V.N., 112 N.J. Super. 544, 271 A. 2d 921, 923 (1970).

[101]In re Elmore, 382 F. 2d 125, 127 (D.C. Cir. 1967). See also Note, supra note 51 at 346.

[102]Rouse v. Cameron, 373 F. 2d 451, 458 (D.C. Cir. 1967).

[103]Tribby v. Cameron, 379 F. 2d 104, 105 (D.C. Cir. 1967). See also Note, supra note 51 at 347.

[104]Rouse v. Cameron, supra note 102 at 458-59.

[105]Id.

[106]325 F. Supp. 781, 785-86.

[107]Note, supra note 6 at 650-51.

[108]Accord, In re D.D., 118 N.J. 1, 285 A. 2d 283 (1971).

[109]Martarella v. Kelley, 349 F. Supp. 575 (D.R.I. 1972); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973); and Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974) aff'g. 355 F. Supp. 451.

[110]379 F. 2d 106, 110 (1967).

[111]See, e.g., Lollis v. New York State Department of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970), modified on appeal, 328 F. Supp. 1115 (S.D.N.Y. 1971), where the court granted a preliminary injunction enjoining the defendants, pending trial, from placing the plaintiff in isolation for an extended period of time without the enjoyment of reasonable facilities during such isolation.

[112]N.Y. Family Ct. Act §762 (McKinney 1971).

[113]34 App. Div. 2d 661, 310 N.Y.S. 2d 125 (2d Dept. 1970).

[114]64 Misc. 2d 878, 316 N.Y.S. 2d 356 (Fam. Ct. 1970).

[115]Note, supra note 6 at 655.

[116]56 Misc. 2d 693, 290 N.Y.S. 2d 486 (N.Y. Ct. Cl. 1968).

[117]Pyfer, supra note 54 at 318-20.

[118]82 Harvard L. Rev. 1771, 1776 (1969), recent cases.

[119]Goodman, Right to Treatment: The Responsibility of the Courts, 57 Geo. L. J. 680, 690 (1969).

[120]Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (1972). See also Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[121]Bailey and Pyfer, supra note 78 at 523.

[122]Halpern, A Practicing Lawyer Views the Right to Treatment, 57 Geo. L. J. 782, 806 (1969).

[123]Bazelon, Implementing the Right to Treatment, 36 Univ. of Chicago L. Rev. 742, 747 (1969).

[124]Id. at 749.

APPENDIX A

INTAKE GUIDELINES

PUBLIC INPUT; RESTITUTION

ORDERING SERVICES

# APPENDIX A

1. Issue Title: Intake Guidelines--Should the family court judge have the authority to determine intake policies and guidelines for intake decision making?

2. Description of the Issue:

There are a variety of different procedures for determining whether a juvenile court will take formal action on a referred juvenile case. Depending on the jurisdiction, this decision may be made by any one of the following: (1) the police (where there is no juvenile intake or where no intake discretion is used with police referrals); (2) the juvenile court intake officials (judicial branch); (3) the juvenile intake officials (executive branch); (4) the juvenile court judge (who reviews referrals informally or at a formal initial hearing); or, (5) the juvenile prosecutor.

A determination as to the appropriate scope of the family court judges' role in intake decision making hinges largely on choices as to: (a) what is the best organizational structure for juvenile intake (judicial or executive), and (b) what should be the role of the prosecutor in juvenile intake? Proper solution of those issues will require thorough consideration of far more comprehensive materials than are contained here.

3. Summary of State Practices:

At present the bulk of the states apparently maintain judicially-administered juvenile intake services. While few juvenile courts have promulgated written, detailed intake guidelines, there is a clear movement in this direction. Under present practices judicial supervision of intake practices tends to be informal, focusing largely on the general characteristics of cases to be judicially or non-judicially handled. On the other hand, some judges still make this determination on a case-by-case basis.

4. Summary of Positions Recommended by Standards Groups:

| | |
|---|---|
| ABA-Probation (1970) (6.1 & 6.4) | No position taken as to judicial versus executive administration; where probation is locally administered, the judiciary should appoint the chief probation officer. |

| | |
|---|---|
| ABA-Trial Courts (1975) (2.71) | The professional staff of the family court division should serve under the court's supervision. |
| ABA-Court Organization (1974) (1.41)(b)(ii)(2) | Probation officers should be under court administration. |
| NAC-Corrections (1973) (8.4) | Juvenile intake should be under court administration. |
| NAC-Corrections (1973) (16.4) | The probation supervision function should be executive administered. |

IJA-ABA-JJSP has taken a preliminary position to place intake officials in the executive branch of government but to vest the prosecutor with the ultimate intake decision-making authority following initial screening by the intake officials.

5. Analysis of the Issue:

Judges, inherently, would have greater authority to approve intake guidelines with judicially-administered juvenile intake. The Arizona Supreme Court has held that the judicial authority to appoint probation intake officials does not contravene a juvenile's right to Equal Protection and Due Process of Law. In re Appeal in Pima County Anon., 515 P.2d 600 (1973). The U.S. Supreme Court denied certiorari in this case. Michaels v. Arizona, -U.S.- (1974), C.C.H.S.Ct. Bull. 3545 (June 10, 1974), Case No. 73-6271. The Arizona Supreme Court approved the practice of the juvenile court judge's supervision of the operation of court employees and noted that the judge does not pass on intake investigation reports or have any involvement in the case prior to the adjudicatory hearing.

The practices of judges in some juvenile courts, of approving or disapproving intake recommendations as to the handling of individual case referrals, would probably not be approved under the Arizona Supreme Court's analysis and is more generally frowned upon as an exercise of a prejudgement which might intrude upon a later adjudicatory judgment by the same judge.

The overall judicial role issue becomes more complex and judicial involvement is viewed as less appropriate with executive-administered intake. There is, for example, a separation of powers concern. Florida law, however, does authorize judicial review of executive intake decisions.

Judicial intervention in a prosecutor's intake authority is the most difficult to rationalize due to the independent stature of the prosecutor who, in almost all states, is an elected official.

6. Task Force Standards and Rationale:

After carefully considering the appropriate organizational structure for the intake unit and the proper division of responsibility between intake workers and the Family Court Prosecutor (see Volume VIII of these Working Papers on Prosecution and Defense.) The Task Force decided that the intake function should be performed by an independent state agency in the executive branch (see Standard 21.1). As the commentary notes,

> Removing the administration of intake from the court should enable the court to be concerned only with the judicial functions of fact-finding and making dispositions. It will not have to preempt the field of social welfare by arranging for appropriate social services when a decision is made to divert the child from the court process. Vesting the state agency with responsibility for intake also removes the concern as to whether the court can be impartial and unbiased--as it must--while at the same time evaluating the work of intake personnel who are under its administrative control.

The intake unit should, of course, develop formal guidelines and directives for appropriate practices. The appropriate scope of the family court's role in reviewing these guidelines is discussed in Standard 18.2 which provides, in pertinent part,

> /I/ntake guidelines and practices should be reviewed with the presiding judge of the family court division. In no event should a judge participate in intake decisions concerning individual case referrals. Judges and intake and probation officers should not discuss cases in the absence of counsel for the state and the child.

The commentary to this standard indicates that such a review is appropriate

> to insure compliance with legal and court rule requirements, and to seek consensus on the types of legal offenses and surrounding circumstances which favor formal judicial consideration or alternative informal dispositions.

When the intake personnel determine that court action is justified, Standard 21.2 indicates that they should then refer the case to the Family Court Prosecutor. The Family Court Prosecutor is

vested with responsibility to review these cases for legal sufficiency and to make a final determination--not reviewable by the court--as to whether a petition should be filed (see Standards 15.13 and 21.2). This approach was viewed as preserving the necessary separation of powers and facilitating impartially of judges.

1. Issue Title: Public Input; Restitution--What steps should be taken to increase the court's concerns for (a) public input and (b) restitution?

2. Description of Issue:

This comparative analysis focuses on the appropriate procedures for (a) formalizing the court's opportunity to increase public input into its administration of justice, suggesting the utilization of the presiding judge of the general trial court as the appointive authority for a representative advisory committee rather than the presiding judge of the family court division; and (b) encouraging the development of authorizing legislation, court practices, and court-community programs to increase restitution to victims of juvenile delinquents.

3. Summary of State Practices:

(a) A number of juvenile and family courts utilize standing citizen advisory committees to provide advice and support and to conduct studies and make recommendations. Authorization for such groups may be by statute (Utah, Oklahoma City-Tulsa); or may follow a rule of court or informal practice (New Orleans, Houston). At present, they are most often appointed by the presiding judge of a juvenile/family court rather than the presiding judge of the general trial court. Also, ad hoc committees are utilized by some juvenile/family courts for limited, short-term purposes, such as studies and recommendations concerning detention needs.

(b) The payment of restitution by juvenile delinquents (or their parents) has been an historic practice in juvenile courts. As a result, formal judicial handling of case referrals has been averted, or, repayment in full or in part, has been ordered as a condition of probation. Often provision for restitution is not made explicit by statute as an alternative for judicial handling. A number of statutes do, however, authorize restitution among alternative judicial dispositions following adjudication (e.g., Utah, Colorado). Some juvenile courts sponsor programs which enable youth to earn restitution funds, or alternatively, perform community work tasks which assist community agencies but do not repair damages to victims (e.g., Rapid City, South Dakota, Minneapolis).

4. Summary of Positions Recommended by Standards Groups:

| | |
|---|---|
| NAC-Courts (1973) (9.6) | Public input into court administration through a forum for interchange between justice system officials and community representatives. |

5. Analysis of the Issue:

(a) Advisory committees should be seen as organized efforts for courts to obtain public input, and as a necessary complement to the court's responsibility to provide public information. Present practice, largely, has selected members from community establishment groups without a more balanced, representative membership which includes minority group persons and the poor. Placing the appointive authority in the presiding judge of the general trial court would recognize the structural changes advanced by other standards (i.e., the juvenile court should become part of a family court division of the general trial court), and assist in reducing the more isolationist tendencies of the juvenile court as a specialized division of the general trial court. Court administrative staff should serve an executive secretary role to the advisory committee to facilitate the latter's effectiveness.

(b) More attention to the problems and concerns of the victims of juvenile offenses should provide fairness to the victim, supplementing the court's concern for fair treatment of the offender. Programs to achieve restitution, theoretically, would provide offenders with a more tangible response, exacted by society--through the courts--for their misdeeds.

6. Task Force Standards and Rationale :

(a) The Task Force's Standard 18.4 indicates that,

> Family court divisions should implement organized programs of public information and education to advise the public of the progress and problems in achieving court objectives. The court should encourage citizen and media observation of court proceedings within statutory constraints.
>
> A representative family court division citizens' advisory committee, appointed by the presiding judge of the general trial court, should provide advice and critique to the family court.

Recognizing that the family courts "carry on public functions at public expense, and these functions require public understanding and support," the commentary calls for both the establishment of an advisory committee to provide advice on an ongoing basis and ad hoc committees to study particular problems facing the court. In particular, the commentary highlights the need for input from minority groups and the poor in the community. Standard 18.5 on the Leadership Role of the Family Court Judge also elaborates on the importance of liaison with the public.

(b) Standard 14.11 specifies that restitution should be one of the dispositional alternatives available to the family court. It states that,

> a. Restitution should be directly related to the delinquent act, the actual harm caused and the juvenile's ability to pay.
>
> b. The means to carry out a restitution order should be available.
>
> c. Either full or partial restitution may be ordered. Repayment may be requested in a lump sum or in installments.
>
> d. Consultation with victims may be encouraged but not required. Payments may be made directly to victims or indirectly through the court.
>
> e. The juvenile's duty for repayment should be limited in duration. In no event should the time necessary for repayment exceed the maximum jurisdiction permissible for the delinquent act.

The commentary outlines the rationale for this dispositional alternative, as follows:

> Restitution is an appropriate sanction when the youth profited financially by the delinquent act and the victim can be compensated if not made whole. It can serve to lessen the alienation between the youth and the victim and between the youth and society since it forces the realization that a specific person has been hurt and needs to be compensated.
>
> Any restitution ordered should be directly related to the juvenile's delinquent act, the actual harm caused and, in those cases where money restitution is ordered, the juvenile's ability to pay (see People v. Becker and Karrel v. United States).
>
> This standard recognizes the beneficence of restitution in kind, where for example, a juvenile repairs damages caused by his vandalism or removes graffiti that has defaced property. This form of restitution is often the most appropriate.

The standard also authorizes the judge to order the juvenile to participate in community service programs.

1. Issue Title: Ordering Services--What should be the scope of authority of family court judges to obtain necessary services for court clientele?

2. Description of Issue:

The basic questions are whether, to assist the court in fulfilling its purposes and responsibilities, statutory and otherwise: (a) legislation should be enacted authorizing judges to compel public officials to provide client services which these officials are otherwise mandated by law to provide; and (b) funding bodies should be encouraged to set aside funds for the court to utilize in purchasing services not otherwise available to the court?

3. Summary of State Practices:

(a) The New York statutory amendment of 1972 (Chapter 1016, Section 255) is seen as the present model. Similar legislation will be introduced in the Virginia legislature during 1976. Possibly several other states have enacted similar legislation.

(b) Certain courts, reputedly in New York and Ohio, and probation departments (California) receive appropriations or are authorized to draw on public funds to provide a variety of external-administered services for court youth. These services may include private residential care, mental health services, certain medical services, and other programs.

4. Summary of Positions Recommended by Standards Groups:

| | |
|---|---|
| ABA-Court Organization (1974) (1.50) | Commentary recommends courts should have sufficient funds to "purchase services, such as those of physicians and psychologists ... and other specialized services that are uneconomical for the court system to provide for itself through its own personnel." |

5. Analysis of the Issue:

(a) The New York Statute recognizes the reality that external public agencies do not always fulfill their statutory mandates. It removes any question of the court's authority to order such public services (education, mental health, social service). It does not intrude upon the private agency. It avoids litigation of the issue of the court's authority to order a public welfare agency to purchase private residential care for a court youth which was upheld in a Colorado case. It facilitates the court's fulfillment of its responsibilities for youngsters who might be discriminated against because they are court youth or otherwise unattractive to the external agency.

(b) A court/probation department purchase of services fund facilitates the use of external agency services for court youth. It allows the provision of services which are otherwise unavailable for court youth. Purchases could be made from private agencies and practioner-specialists, or from public or quasi-public agencies, such as mental health services, where the court's need for services is better met because the court is paying for these services on an annual or per capita contract basis. Such a fund may pose some conflict with other public agencies which receive appropriations for the purchase of services for court-referred youth as well as for designated non-court youth.

6. Task Force Standards and Rationale:

(a) The Task Force's Standard 18.3 on The Court's Relationship with Public and Private Social Service Agencies indicates that,

> Family court divisions should maintain effective working relationships with public and private social service agencies in assisting individuals and families. The respective procedures and responsibilities of the court and social service agencies should be clarified through written agreements. These agreements should be reviewed on the basis of experience, and modified as needed.
>
> Court personnel should develop systems to monitor external agency services. Such agencies should comply with the court's need for social reports, for direct testimony at hearings, and for information as to serious problems in implementing the court's objectives in the individual case. The court should provide prompt hearings in making decisions relevant to agency provision of necessary services to children.

The commentary to this standard specifically urges state legislatures to adopt laws similar to the 1972 New York amendment (Chapter 1016, Section 255). The Task Force felt that making explicit judges' authority to order officials of public agencies to render services to court clientele which the law otherwise requires them to provide was important in order to ensure that services which are needed and ordered by the court are in fact provided.

(b) The Task Force's Standard 14.19 on Provision of Dispositional Services specifies that,

> In both conditional and custodial dispositions, the administration of correctional programs, assignment and reassignment of juveniles to activities, programs and services within the category and duration ordered by the court should be the responsibility of the state's correctional agency.

a. Purchase of Services
Services may be provided directly by the state correctional agency or obtained by that agency through purchase of services from other public or private agencies. Whichever method is employed, the correctional agency should set standards governing the provision of services and establish monitoring procedures to ensure compliance with such standards.

b. Prohibition Against Increased Dispositions
Neither the severity nor the duration of a disposition should be increased in order to ensure access to services.

c. Obligation of Correctional Agency and Family Court
If access to all required services is not being provided to a juvenile under the supervision of the correctional agency, the agency has the obligation to so inform the family court. In addition, the juvenile, his parents, or any other interested party may inform the court of the failure to provide the services. The court may act on its own initiative.

If the court determines that access to all required services in fact is not being provided, it should do the following:

1. The family court may order the correctional agency or other public agency to make the required services available.

2. Unless the court can ensure that the required services are provided, it should reduce the nature of the juvenile's disposition to a less severe disposition that will ensure the juvenile access to the required services or discharge the juvenile.

The commentary makes the following remarks on purchase of services:

Purchasing services from outside sources is recommended where it avoids duplication or where it provides access to programs otherwise unavailable. Purchase of service allows the correctional agency more flexibility in choosing existing services rather than investing capital to create its own programs. Additionally, it has the added benefit of promoting community involvement with offenders.

The Task Force concluded that the administration of juvenile intake and corrections should be unified in a single state agency. Thus, it provided this agency, rather than the court itself, with general responsibility for purchasing services (see also Standard 19.3).

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